111-389

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 315.

JAMES HORNBUCKLE AND SAMUEL MARSHALL, PLAINTIFFS IN ERROR,

vs.

JOSEPH V. STAFFORD.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF MONTANA.

FILED SEPTEMBER 27, 1881.

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1 In the Third Judicial District Court in and for Meagher County, Montana Territory.

JOSEPH V. STAFFORD, Plaintiff,

vs.

JAMES HORNBUCKLE and SAMUEL MARSHALL, Defendants.

This is an action for an injunction and for damages, and the following pleadings were filed by the parties, to wit:

Complaint.

In the District Court, 3d Judicial District, Meagher County, Montana Territory.

JOSEPH V. STAFFORD, Plaintiff,

vs.

JAMES HORNBUCKLE and SAMUEL MARSHALL, Defendants.

The plaintiff in the above entitled cause complains of the defendants herein, and alleges:

1. That at the date hereinafter mentioned, and for a long time prior thereto, this plaintiff was, and now is, entitled to a sufficient amount of the waters of Avalanche creek, in the county of Meagher, and Territory of Montana, as would amount to thirty-five inches, miner's measurement, at or where at any point on said creek
2 above where what is known as the White and Thomas ditch taps and intersets said creek.

2. That on the 11th day of July, A. D. 1871, in an action duly pending in the district court of the 3d judicial district, Lewis & Clarke county, Montana Territory, wherein John Gallagher and said defendants were plaintiffs, and this plaintiff and others were defendants, a judgment and decree was duly rendered in favor of this plaintiff, whereby it was duly adjudicated and determined that this plaintiff was so entitled to the use, benefit, possession, and enjoyment of the amount of water at the points aforesaid in said creek.

3. Plaintiff further states that he is the owner of, and in possession and entitled to the possession, and was such owner in possession and entitled to the possession of a certain water ditch tapping and intersecting said creek at a point about one mile below what is known as the Avalanche ditch, and above the said White &
3 Tower ditch, and is and was at the date hereinafter mentioned, entitled to have flow down, into, and through the said ditch of plaintiff, known and designated as the Basey ditch, such an amount of the waters of said creek as would make thirty-five inches, miner's measurement, at the head of said White and Tower ditch.

4. Plaintiff further avers upon his information and belief, that such an amount of water as will make thirty-five inches, miner's measurement, at the head of said White & Tower ditch, will require and make at the head of said Basey ditch one hundred and twenty-five inches, miner's measurement, which said amount of water plaintiff charges and avers. that he is now, and was at the date hereinafter mentioned, entitled to have flow down and through

said Basey ditch, and was and is entitled to have the said amount of thirty-five inches, miner's measurement, flow down and into the said White & Tower ditch, at the option of plaintiff, without let or hindrance from said defendants, by virtue of his said prior-
4 ity of rights and appropriation, and the judgment and decree aforesaid.

5. That notwithstanding the said rights of plaintiff in the premises, said defendants, heretofore, to wit, on the first day of April, A. D. 1878, wrongfully and unlawfully diverted all of the waters of said creek therefrom, above the heads of said Basey ditch and said White & Tower ditch, so as to prevent said water or any thereof from running down to and into said plaintiff's ditch, which it would otherwise have done and continued to do. That said plaintiff, heretofore, to wit, on the first day of April, A. D. 1878, demanded of said defendants the water aforesaid, and that they permit the same to run down said creek as aforesaid, and desist from further diverting the same; that notwithstanding said demand said defendants continue to divert said water as aforesaid, to the damage of this plaintiff in the sum of one hundred dollars.

6. Plaintiff further states that he will continue to be dam-
5 aged in the sum of eight dollars per day for each and every day said defendants continue to divert said water, which said sum per day is the reasonable value thereof.

And said plaintiff further shows unto this honorable court that unless said defendants be enjoined and restrained from further diverting said water as aforesaid, he will sustain great and irreparable injury and damage, and his said ditches and water right rendered wholly worthless.

Wherefore plaintiff prays judgment for said sum of one hundred dollars damages so sustained by him as aforesaid; also the sum of eight dollars per day for each and every day the same is so diverted up to the trial of this cause; and that upon the final judgment and decree herein, said defendants, their agents, hands, and employes be forever enjoined and restrained from so diverting said water; that a temporary injunction restraining order issue during the pendency of this action against said defendants, their agents, hands, and employees, and that said plaintiff have such other or fur-
6 ther relief as may be just and equitable, and that he recover his costs and disbursements in this behalf expended.

E. W. TOOLE,
Attorney for Plaintiff.

TERRITORY OF MONTANA, } ss:
County of Meagher, }

Joseph V. Stafford being duly sworn, deposes and says that he is the plaintiff herein; that he has heard the foregoing complaint read and knows the contents thereof, and that the matters and facts therein stated are true of his own knowledge, except as to such matters and facts as are therein stated on information and belief, and as to those matters he believes it to be true.

JOSEPH V. STAFFORD.

Subscribed and sworn to before me, this second day of April, A. D. 1878.

Witness my hand and notarial seal.

[SEAL.] L. ROTWITT,
Notary Public.

7 And on the 13th day of April, A. D. 1878, the said defendants filed their answer herein in words and figures following, to wit:

Answer.

In the District Court, Third Judicial District, County of Meagher, Territory of Montana.

JOSEPH V. STAFFORD, Plaintiff,
vs.
JAMES HORNBUCKLE and SAMUEL MARSHALL, Defendants.

And now come the above-named defendants, James Hornbuckle and Samuel Marshall, and, for answer to the complaint of the above-named plaintiff in this action, deny that at the time mentioned in the said complaint, or at the time of the filing of said complaint, the said plaintiff was entitled to a sufficient amount of the waters of Avalanche creek, mentioned in the said complaint, as would amount to thirty-five inches, miner's measurement, at any point on the said Avalanche creek, or any other amount whatever of the waters of the said creek.

8 Deny that prior to the 30th day of March, 1878, said plaintiff was the owner of, or in possession of, or entitled to the possession of, the ditch known as the Basey ditch, but avers that the said Basey ditch up to that date was the property of, and in the possession of, the Avalanche Ditch Company, of whom the plaintiff was one of the members, owning only a four-fifteenth interest in the said ditch, the defendant, Samuel Marshall, being at said date, and until the conveyance thereof to the said plaintiff, the owner of the other eleven-fifteenths thereof, said conveyance expressly reserving therefrom the transfer of any water right in or to run in said Basey ditch; and defendants deny that said plaintiff is entitled, or at any time mentioned in said complaint that he was entitled, to have flow into, down, and through the said Basey ditch such an amount of the waters of said creek as would make thirty-five inches, miner's measurement, at the head of said White & Tower ditch, or any other amount of water whatever.

9 Deny that said plaintiff is now, or that he was at the time mentioned in said complaint, entitled to have flow down and into the said White & Tower ditch the amount of thirty-five inches of water, miner's measurement, at his, said plaintiff's, option, without let or hindrance from these defendants by virtue of any prior appropriation or any judgment or decree, or otherwise.

Deny that these defendants, on the first day of April, 1878, or at any other time, unlawfully diverted the waters of said creek therefrom at any place whatever; and deny that said plaintiff has sus-

tained, or that he will sustain continuously, any damages whatever by reason of any act of defendants already committed, or threatened to be committed by them.

And these defendants for further defense to the action of said plaintiff, aver, that about and in the year A. D. 1869, a company was formed consisting of the following named persons, viz: Samuel Clem, O. C. Warner, W. O. Warner, Henry Clapper, Israel Clem, and the plaintiff, for the purpose of constructing a ditch to convey
the waters of Avalanche ditch or gulch from said Avalanch
10 gulch to the foot hills of Cave gulch, and was called and named the Hellgate and Avalanche Ditch Company; that at said time the said S. Clem, Warners, Clapper, Israel Clem, were the owners of, and in the possession of, a large amount of valuable placer mining ground at and in the neighborhood of said Cave gulch, in which said plaintiff had no interest of any kind whatever; that prior to, and at the time of the formation and organization of the said Hellgate and Avalanche Ditch Company, the said plaintiff was, or claimed to be, the owner of the ditch known as the White and Tower ditch, and the water right connected with and appurtenant thereto, and that when said company was so formed, it was agreed between them that the said ditch called the Avalanche ditch should be constructed, and that the said Samuel Clem, O. C. Warner, W. O. Warner, Henry Clapper, and Israel Clem, should put in as common stock the mining ground so owned by and held by them, and the said
plaintiff should put in as common stock the said White & Tower
11 ditch, and all the water rights and privileges connected with and appurtenant thereto, and that the whole property, mining ground, ditch, and water rights and privileges should be held and owned in common by the said Avalanche Ditch Company, each member of said company owning the one-sixth part thereof. That with the joint property and means of said Hellgate and Avalanche Ditch Company, the said parties composing said company immediately proceeded with the construction of the said ditch. And defendants further aver that after the completion of the said ditch, the said Avalanche Ditch Company, with their joint means, viz.: from the gold extracted and mined from the mining ground so contributed by the said S. Clem, O. C. Warner, W. O. Warner, I. Clem, and Henry Clapper, to said company as their contribution to the capital stock and other mines of said company, purchased the said Basey ditch and a ditch known as the Cahill ditch, for the sum of $4,600.00, which, with the water rights and privileges thereunto
appurtenant, became the property of the said Avalanche
12 Ditch Company. That in the fall of the year 1870, the whole of the waters of said Avalanche ditch and gulch were turned into the said Hellgate and Avalanche ditch, including all of the waters thereof, in or to which the said plaintiff had any claim or interest. and in pursuance of the said agreement so entered into when said company was originally organized, as aforesaid, and from that time hitherto, have always been held, possessed and enjoyed by said company as the joint property thereof; the said plaintiffs never, until a few days before the commencement of this action,

making, asserting, or setting up any claim to the exclusive use of any part or portion thereof, but at all times recognizing and acknowledging the rights of said company in and to the same. And these defendants further aver, that on or about the thirtieth day of March, A. D. 1878, the said plaintiff, for a valuable consideration, by deed bearing date on the said thirtieth day of March, 1878, conveyed to these defendants all of his interest in the said Hellgate and Avalanche ditch to these defendants, James Hornbuckle and Samuel Marshall, and that the said defendants are
13 now and ever since the last mentioned date, have been the sole owners of the whole of the said Hellgate and Avalanche ditch and all the water rights and privileges connected therewith and appurtenant thereto. The said defendant Samuel Marshall having, prior to that date, purchased from the other owners thereof all of their interest therein. And these defendants on information and belief, deny, that on the 11th day of July, 1871, in an action pending in the district court of the 3rd judicial district, in and for Lewis and Clarke county, wherein Joseph Gallagher and defendants were plaintiffs, and the said plaintiff and others were defendants, a judgment and decree were rendered as stated in said complaint; but they admit that a decree was rendered in a cause wherein John Gallagher and these defendants were plaintiffs, and the said plaintiff and others were defendants, adjudging the said plaintiff thirty-five inches of the waters of Avalanche gulch, as stated in said complaint, but these defendants charge and aver, that the said decree was so entered decreeing the waters aforesaid to said Stafford
14 for the benefit of the owners of the said Hellgate and Avalanche ditch; and that by agreement among and by consent of the said company, who, at that time, were the owners of the said waters, and for the reason that the title thereto was in the name of the said Stafford, no formal conveyance thereof having been made by him to the said company at the time of the construction of their ditch, the said decree was so entered in favor of said plaintiff, Stafford, and for no other reason; and they further aver that said Stafford, plaintiff, has never, at any time until the alleged demand of said water from these defendants, ever made or pretended to have any exclusive claim to the use and enjoyment thereof, but has at all times acknowledged and recognized the right of the said company thereto. And they further aver that, ever since the said 11th day of July, 1871, and ever since the construction of the said Hellgate and Avalanche ditch, they have held and claimed the said water adversely to said plaintiff; and that any claim or pretended claim thereto by the said plaintiff is barred by the statute of limita-
15 tion at that time in force, as well as by the laws of Montana Territory, approved February 16th, 1877.

And these defendants further aver on information and belief, that all of the costs and expenses of the aforesaid action in which the said decree was rendered, including attorneys' fees, amounting to not less, as these defendants have been informed and believe, than the sum of five thousand dollars, were paid by the said Hellgate and Avalanche Ditch Company, and that the said suit was

defended throughout by the said company for the benefit of said company, and not for the benefit of said plaintiff, other than as a member of said company. And they further aver that by the deed aforesaid, executed by said plaintiff to these defendants, he sold and conveyed to them all of his interest in the waters claimed by him in said complaint, and that he, said plaintiff, never claimed or pretended to claim, or to demand from defendants said water or any part thereof, until after he had so conveyed it to them, and had received the consideration paid by them to him therefor.

16 Wherefore the defendants demand judgment against the plaintiff for their costs.

CHUMASERO & CHADWICK.
SHOBER & LOWRY,
For Defendants.

TERRITORY OF MONTANA, } ss:
Lewis & Clarke County. }

Samuel Marshall, being duly sworn, says, that he is one of the defendants named in the foregoing answer; that he has heard the same read, and that the facts therein stated of his own knowledge are true, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

(Signed) SAMUEL MARSHALL.

Subscribed and sworn to before me, this 13th day of April, A. D. 1878.

WILLIAM CHUMASERO,
Notary Public.

And on the 23rd day of April, A. D. 1878, the said plaintiff filed herein his replication to the said answer of the defendants, of which, in words and figures, the following is a copy, to wit:

17 *Replication.*

In the District Court of the 3rd Judicial District, Meagher County, Montana Territory.

JOSEPH V. STAFFORD, Plaintiff,
vs.
JAMES HORNBUCKLE and SAMUEL MARSHALL, Defendants.

Now comes the plaintiff, and for replication to the new matter set up in defendants' answer admits that a company was formed for the purpose of constructing the ditch mentioned in said answer, but deny that said company was formed or contemplated until about the first of July, A. D. 1870.

Admits that the parties mentioned in said answer owned certain mining ground therein mentioned in the year A. D. 1869, and that said plaintiff exchanged certain other property by him owned at that time therefor, but denies that it embraced or included his right to the waters of Avalanche gulch, belonging to said White & Tower ditch, and avers that he never has parted with his right or title to the same.

18 Denies that said plaintiff ever agreed to or did put in said company, as a part of the common stock thereof or any stock thereof, the said White and Tower ditch, or any water right or privilege with the same connected or appertaining thereto.

Denies that the same, or any part thereof, was to be held or owned in connection with the said property of the Avalanche or any other ditch company.

Admits that, with the joint property and means of said company, they proceeded to construct said dith by extending what was known as the Hellgate ditch to said Avalanche gulch, but avers that the same was done in the year A. D. 1870, and for the purpose of conveying the unappropriated and unused waters of said Avalanche gulch.

Admits that said company purchased the said Basey and Cahill ditches, but denies that the same was done with the proceeds of the mining ground contributed or put into said company by the persons mentioned in said complaint, or that the same was taken from the mining ground described in said answer.

19 Admits that in the fall of the year A. D. 1870 all of the waters of said Avalanche gulch, including the water claimed by plaintiff, was turned into said ditch; but denies that the same was done in pursuance of the agreement mentioned in said answer, or that the said portion thereof so claimed by plaintiff has from that time or any time been held or possessed by said company as the joint property thereof; and avers that the said portion of said water was so turned in and used by said company by the license and permit of plaintiff at such times and for such periods, as the same was not desired by plaintiff for farming purposes, for which purpose he had at all times and now is entitled to have, possess, and use the same, and that at all times, when requisite and necessary heretofore, and up to the diversion mentioned in said complaint, used and enjoyed the same.

Denies that he at all or any times, except as before stated, recognized any right, or acknowledged any right of said company to said water; and avers that he hath at all times claimed and asserted his claim to, and used and possessed said water when so desired

20 or required by him; that he hath for the last five years next preceding the commencement of this action so held, possessed, and occupied the said water so claimed by him in his own and exclusive right for the purposes and uses aforesaid, and is entitled thereto.

Admits that on the 30th day of March, A. D. 1878, he conveyed to said defendants all his interest in said Hellgate and Avalanche ditch, with all the water rights and privileges thereto belonging; but avers that said water right claimed by plaintiff was his individual property and right for the purpose aforesaid, and was expressly reserved from said conveyance.

Denies that the decree mentioned in said complaint was rendered or entered for the benefit of the owners of said Hellgate and Avalanche ditch, save such benefits as might accrue by reason of the said plaintiff's uncontested title and right to the waters so claimed

by him and the use thereof, permitted as aforesaid in connection with other waters of said gulch, appropriated and purchased by said company, and then being litigated in said action.

21 Admits that the title to said water so claimed by plaintiff was in him at the time of the construction of said ditch, and the entry of said decree, and avers that the same was, and now is, so retained by him.

Denies that said company, or any one else, has claimed or held said water adversely to said plaintiff at any time, or that his claim or right thereto has become barred by any statute of limitation then or now in force in this Territory.

Denies that said suit was prosecuted or defended by said company for any purpose than as hereinbefore stated, or at any such cost or expense as is alleged in said answer.

Denies that by the deed aforesaid to said defendants he conveyed away any individual right to said water then and now claimed by him.

Wherefore plaintiff prays for the relief asked for in his said complaint.

E. W. TOOLE,
Attorney for Plaintiff.

TERRITORY OF MONTANA, } *ss:*
County of Meagher, }

22 Joseph V. Stafford, plaintiff herein, makes oath and says, that he has heard the foregoing replication read and knows the contents thereof, and that the matters therein stated are true of his own knowledge, except as to such matters as are therein stated on information and belief, and as to those matters he believes it to be true.

J. V. STAFFORD.

Subscribed and sworn to before me, this 23d day of April, A. D. 1878.

ALEX. H. BEATTIE, *Clerk.*

The cause being regularly called for trial, a jury was empanneled to try the cause on the 25th day of May, 1878. And thereupon the following evidence was introduced.

The plaintiff called as a witness, J. V. STAFFORD, who, (as plaintiff,) testified as follows:

"I knew the 35 inches of water since 1866; became the owner thereof in the spring of 1867; I used the water for irrigating purposes from the spring until fall, all through the irrigating season; I used it every year; two years on Basey gulch, which I
23 rented from the Avalanche Ditch Company; it would take 150 inches at the Basey ditch to make thirty-five inches at the White & Tower ditch."

Plaintiff here introduced in evidence the decree in the case of J. Gallagher *et al. versus* Basey *et al.*, which said decree is as follows, to wit:

Decree.

In the District Court of the Third Judicial District of the Territory of Montana, within and for the County of Lewis & Clarke. July Term, A. D. 1871, D. S. Wade, judge.

JOHN GALLAGHER, JAMES HORNBUCKLE, and SAMUEL MARSHALL, Plaintiffs,
against
W. BASEY, JAMES MCCABE, JOSEPH V. STAFFORD *et al.*, Defendants.

This cause having been commenced and brought on for trial and a hearing in the district court of the third judicial district of the Territory of Montana within and for the county of Meagher, (the same being the county in which the subject matter of the action is situate), at the May term of said court, holden in said county,
24 in the year of our Lord 1871, upon the pleadings and proceedings therein, and the parties to this action, both plaintiff and defendant, then and there having appeared by their counsel, and the issues of fact having then and there been joined and submitted to a jury, and all of the evidence in the case, both on behalf of the plaintiffs and the defendants, having been fully heard by the jury, as well as this court , and the jury having brought in their findings upon the questions of fact so submitted to them, which findings are filed with the other proceedings in this cause, and the evidence in this action having been closed, upon agreement of all of the parties to this action by a stipulation in writing, which is duly filed in this court, the venue of this action was, by the order of this court, changed from the said county of Meagher to the county of Lewis & Clarke aforesaid, and pursuant to said order of said court, all of the pleadings, records, findings, and other proceedings relating to said action having been duly transmitted to, and filed in the above entitled court for final hearing of said cause, and this cause coming on the — day of July, A. D. 1871, to be heard and decided by this court upon the pleadings, evi-
25 dence and proceedings therein, including the findings of said jury filed as aforesaid, and Messrs. Chumasero & Chadwick, and Orr and Shober and Lowry appearing as counsel for the plaintiffs, and Toole & Toole and J. A. Johnston appearing as counsel for the defendants, and the pleadings in the case being opened, upon debate of the matters and hearings what was alleged by the counsel on both sides, and upon the pleadings, evidence, and proceedings in the case, including said findings of said jury filed as aforesaid. And it appearing from the premises to the satisfaction of this court that as against the plaintiff's in this action, the right of the defendant, J. V. Stafford, to the use and enjoyment of such an amount of the waters of Avalanche creek, mentioned in the plaintiff's complaint, to be taken from said creek at the head of defendant's ditch as would amount to thirty-five (35) inches at the head of the plaintiff's ditch is clearly and fully established, and that as against the defendant's in this action, saving the above amount of the waters of said gulch, the plaintiffs in this action are

clearly entitled to the free use, occupation, and enjoyment of
26 two hundred and fifteen (215) inches, miner's measurement,
of the waters of said Avalanche creek, to be taken therefrom at the point where their said ditch taps said Avalanche creek, as described in said complaint; and that the said plaintiffs have an indisputable right as against the defendants to have said amount of the waters of said gulch at all times to flow down said creek to the head of their said ditch, and that the defendants, previous to the commencement of this action, had diverted said waters from plaintiff's ditch; and it further appearing to this court that the plaintiff's are entitled to their costs in this action expended, therefore it is ordered, adjudged, and decreed that the defendants, W. Basey, James McCabe, J. V. Stafford, O. C. Warner, W. Warner, S. Clem, and I. Clem, their grantors, agents, servants, employes, and all persons whomsoever claiming or acting through or under them or either of them be, and are hereby, perpetually enjoined from in any manner whatsoever diverting or interfering with, or interrupting the natural flow of the waters of Ava-
lanche creek or gulch, situate in the county of Meagher,
27 in the Territory of Montana, in such manner as to prevent
the full volume and amount of two hundred and fifteen (215) inches, miner's measurement, of said Avalanche creek from flowing at all times down the natural channel of said gulch or creek to and unto the head of the ditch of plaintiffs, John Gallagher, James Hornbuckle, and Samuel Marshall, described in the complaint of plaintiffs, and which said ditch taps the said Avalanche creek below the ditch of said defendants, and conveys the waters of said Avalanche creek to, in, and upon the ranches and farms of the plaintiffs, located upon the Missouri river valley, in said county of Meagher.

It is expressly provided, however, that the defendant, J. V. Stafford, may at all times take of the waters of said Avalanche creek thirty-five (35) inches at the point on said Avalanche creek where the plaintiffs' ditch taps the same, or at any point on said creek above where plaintiffs' ditch taps the same, it being hereby determined, adjudged, and decreed, and it is hereby ordered, adjudged,
and decreed, that when there is a sufficient amount of water
28 flowing down in said Avalanche gulch to convey to the point
where plaintiffs' ditch taps the same to make two hundred and fifty (250) inches of said water, that plaintiffs shall be entitled to two hundred and fifteen (215) inches of said water as against all of said defendants, and whenever there is a volume of water flowing in said stream to the point where plaintiffs' ditch taps the same less in amount than two hundred and fifty (250) inches, and an excess of thirty-five (35) inches, then the plaintiffs as against said defendants shall be entitled to all of such volume in excess of said thirty-five (35) inches. And it is further adjudged that the plaintiffs aforesaid do have and recover from the defendants their costs in this action, taxed at —— dollars.

The foregoing decree is based upon the special findings of the jury in this case and the pleadings therein.

D. S. WADE, *Judge.*

The plaintiffs here rested their case.

The defendants then called as a witness ISRAEL CLEM, who testified as follows, to wit:

29 "I have known the plaintiff since A. D. 1866, at Cañon Ferry; I have known the defendants since A. D. 1867; I know the Hellgate and Avalanche Ditch Company and the ditches since A. D. 1869; it was constructed by the plaintiffs, W. O. Warner, H. Clapper, myself, O. C. Warner, and I. Clem. The company was formed between the 20th of June and the 5th day of July, A. D. 1869. The construction commenced of Avalanche ditch to Hellgate in 1870. The ditch waa constructed to convey all of the water of Avalanche gulch, except the Basey right. The White and Tower right was included, to be taken by the members of the company. W. O. Warner, O. C. Warner, I. Clem, S. Clem, and Clapper owned mining ground on Cave gulch foot-hills, and, together with the plaintiff, formed a company to build and construct the ditch from Avalanche gulch. We were to throw in the ground, and the plaintiff was to put in the water right claimed by him, and make six equal interests in all the property. I am not now a member of the company. I was a member of the company from its formation until the 18th day of April, A. D. 1873. From the time the ditch
30 was built and the thirty-five (35) inches of water were turned in, the company used it on the mining ground. The first season after the ditch was finished it was used on Cave gulch foot-hills. The Basey and Cahill rights were purchased by the company and paid for out of the proceeds of the mines belonging to the company. The water used by the company was the same water as is included in the decree. The plaintiff, while I was a member of the company, never claimed any right to the thirty-five (35) inches of water. When the agreement was made to contribute the mining ground and the water rights, all of the members of the company were present. Samuel Clem is not now in the Territory. Clapper is dead. In the year A. D. 1871 plaintiff put in a crop on the Basey ranch, and by an agreement with the company he was to use the surplus water, and if the surplus water was not enough he was to pay the company for what water he used over that amount. He rented the ranch from the company, and conveyed the water through the company's ditch. He was not to pay any rent for the ranch. The company gave him the privilege to put in a crop and to take the chances on water, agreeing to pay
31 for it the same as miners paid. In the year A. D. 1872 he leased the ranch from the company for $1,000, and the company was to furnish water to irrigate the crop. In the year 1873 we agreed to pay $2.50 per acre for the amount he put in, and take chances on surplus water; he was to purchase the water if he used more of it than the surplus. He never at any time claimed the thirty-five (35) inches of water, except as a member of the company. Plaintiff was president of the company from July, 1870, up to the time I left, in 1873. I then sold out to the company. The Warners, Clems, and Clapper owned 2,800 feet of mining ground on

Cave Gulch foot hills, Stafford owning no interest in it. He owned the White & Tower water right, and agreed to throw that in against the ground, and the ground and water right became the property of the company. There was some ground, &c., in Magpie; he agreed to abandon that if the other members would buy the other interests. Stafford owned seven-twelfths, and the other members of the company bought the remaining $\frac{5}{12}$ for the company.
32 This was about the month in which the company was formed, and the whole was thrown into the company, each member owning one-sixth.

The Cahill right was bought in A. D. 1870, and the Basey right in 1871. I was one of the parties to the decree. I had a conversation with plaintiff in August, A. D. 1871, shortly after learning that the decree was rendered; the company supposed it would be in their name.

O. C. Vandberger and myself went to Stafford, and Warner said, the decree is in your name, when it should have been in the name of the company; you don't intend to claim this as your individual property, do you? He said he had no claim upon it, except for the benefit of the company. He said the company had borne the expense of the suit, and of course the decree was for the benefit of the company. This was at plaintiff's house. He said the company had defended the suit and had paid the expenses. The ranch on which Stafford used the water was the Basey ranche and ditch owned by the company.

Cross-examination:

33 At the time the trade was made and the company formed we had no ditch to Cave gulch. There was the Hellgate ditch to the foot-hills of Magpie gulch in the year A. D. 1869. Magpie is situate between Hellgate and Cave gulch. The waters of Magpie gulch were then owned by a company. Stafford owned $\frac{7}{12}$ when the Hellgate and Avalanche Ditch Company was formed in the year 1869. The Hellgate and Avalanche ditch was commenced in the July after the Hellgate ditch was commenced in May, A. D. ——. Until the year A. D. 1870 no work was done on the Hellgate and Avalanche ditch. The ditch between Hellgate and Avalanche gulches was surveyed on the seventh day of July, A. D. 1869, and the waters of Avalanche gulch were turned out, and notice thereof posted up. This was done by the members of the Hellgate and Avalanche Ditch Company, including Stafford. I don't think it was known as the Hellgate and Avalanche Ditch Company until we commenced to dig the ditch from Hellgate to Avalanche. We knew of no other water rights, when the company was formed, but Cahill, Basey, and the White and Tower. In the years A. D. 1868 and 1869 there was but little water running in the
34 gulch; at some seasons, for two or three weeks, in time of high water, 2,000 or 3,000 inches of water runs down gradually. We claimed all of the water, 1,000 inches. The Basey right was 700 inches of water. We purchased this right after Gallagher *et al.* suit was brought. It was agreed by the company that they

would buy the Cahill right to the water before work commenced on the ditch; one thousand ($1,000.00) dollars of the purchase money was paid from the proceeds of the ground, which was put in by the 5 members of the company.

Redirect:

We did not recognize the Gallagher and Hornbuckle right to the water; we did not know that they had any right to the water. The plaintiff claimed that he owned the White and Tower right to the water, and that there was no other water right, except the Cahill and Basey rights, beside what he owned. The $1,000 was taken out in the month of July, A. D. 1871. In season of low water I have seen the water in Avalanche gulch down as low as 150 inches. The White and Tower ditch is located four or five miles below the Avalanche ditch. No water has been used in the White and
35 Tower ditch since the year A. D. 1869.

O. C. WARNER testified as follows, to wit:

"I have known the parties to this action for the period of twelve years; I was a member of the Hellgate and Avalanche Ditch Company when the same was first formed, in the year A. D. 1869; I am acquainted with the waters of Avalanche gulch, and with the White & Tower right to a portion of the same. It was a part of the Hellgate and Avalanche Ditch Company's property. It was put in in the year 1869, the latter part of June or the first of July, in consideration of the mining property owned by the Clems, Warners, and Clapper, and I put in the mining ground which I owned individually. Plaintiff put in against it the White and Tower water right, and Stafford became a member of the company. The Hellgate ditch was commenced in the month of May, A. D. 1869. The Avalanche ditch was surveyed and located about the first of July. The water was turned in on the seventh day of July, A. D. 1869. The other five members of the company owned between six
36 and seven hundred feet of ground on the west side, and four hundred feet on the east side of said gulch. I owned sixteen hundred feet; I was not a member of the company at that time.

Plaintiff himself claimed to own the White and Tower water right. The property was thrown together and became the common property of the company. The Hellgate ditch was commenced in the summer, and completed in the month of September or October, A. D. 1869. There was a water right in Magpie gulch, which was partly owned by plaintiff, and which was purchased after the Hellgate ditch was started. The ditch from Magpie gulch was surveyed in the fall of the year A. D. 1869. We turned the water into the Avalanche ditch on the twenty-first day of September, A. D. 1870, all the water there was there. The company continued to use that water until the present time; I was a member of the company until the spring of the year A. D. 1874; the White & Tower water was turned in before the arrangement was made about the Magpie gulch water; in the month of July, A. D. 1869, the Magpie gulch water was claimed by the plaintiff and other. J. Fischer and

37 Hendrickson owned five-twelfths; the other five members of the company were to buy the five-twelfths, and turn the same in against what interests plaintiff had in the company property, and they did purchase it. The interest acquired by the company from the plaintiff did not enter into any part of the consideration of the Stafford interest in the Hellgate and Avalanche Ditch Company.

The plaintiff rented the ranche from the company in the year A. D. 1872, and used the water in the year A. D. 1873. He rented the ranch for $2.50 per acre. He took his chances for water, over and above the surplus, after the ditch was filled. The plaintiff never asserted any right to the White and Tower ditch water during the time I was a member of the company. I had a conversation with the plaintiff in the month of August, A. D. 1871, on a pile of slabs on the bank of the river. Myself, Clem, and Vandebarker were present. I told him that this decree had been rendered in his name, and asked him if he laid claim to the water decreed to him; if he made any claim to it. He said that he laid no claim to it whatever; that it was the company's property."

38 Cross-examination:

Where we run the ditch across Magpie gulch, at the head of Hornbuckle's ditch, there was twenty-six inches of water—below the springs there were eighteen inches measured; in all there were about one hundred and twenty inches of water. In the year A. D. 1866, there were five hundred or six hundred inches of water in Hellgate gulch. The quantity of water varies from 5 or 600 inches of water to 10 inches. In Avalanche gulch the highest stages of water are from 10 inches to 2,000 inches of water. In the month of June, A. D. 1870, about seven hundred inches of water were, at that time, running. At that time there were disputed titles to the water; Hornbuckle, Gallagher, and Marshall claimed five hundred inches. When the plaintiff put in the water to the company, he claimed to own all of the water of Avalanche gulch; he acknowledged no other right; he did not speak of the thirty-five inches. It was the White & Tower right to the water more particularly that was decided by the court to be thirty-five inches. The company was known, by the company, as the Hellgate and Avalanche Ditch Company. The by-laws were passed by them the
39 next year, when the plaintiff became president and Clem secretary. The agreement about putting in the ground and water was after the company was formed. The contract to dig the ditch from Avalanche gulch to Hellgate was, I think, entered into on the 24th day of July, A. D. 1870. The length of digging was about 690 rods. Hornbuckle and Marshall's water had been used on the ground, put in by the five members of the company. They had taken up the water right of Hellgate with the plaintiff before the Hellgate and Avalanche Ditch Company had been organized. Magpie gulch water had not been conveyed to Cave gulch before the company was organized. The Hellgate ditch was started for a "bar" in Magpie gulch. The water from the springs in Magpie

gulch, where the Hellgate and Avalanche gulch ditch takes it up, runs fifty or sixty inches without much variation. The springs spoken of are what are called the Toombs Springs."

W. O. WARNER testified as follows, to wit: "I have lived in Cave gulch since year A. D. 1866; I was a member of the Hellgate
40 and Avalanche Ditch Company; I was an original member of the company. The company was formed the latter part of June, A. D. 1869. W. O. Warner, O. C. Warner, Israel Clem, Samuel Clem, H. Clapper, and J. V. Stafford composed the company at that time. O. C. Warner owned 1,600 feet of mining ground. I owned four hundred feet. I. Clem, 200 feet; Clapper, 200 feet, and S. Clem, 200 feet. The plaintiff was to contribute the White and Tower water right and the springs in Magpie gulch. He was to put the White and Tower right to the waters of Avalanche gulch into the company. The other members were to put in the mining ground. The Cahill and Basey rights were to be bought by the company. The plaintiff that those rights, and the White and Tower right were all the water rights in Avalanche gulch. He said Hornbuckle and Marshall had no rights. The balance of the company owned $\frac{5}{12}$ of Magpie gulch after the agreement made to form the company. The plaintiff owned no right in the springs. He agreed to put in the White & Tower right to the company against the mining ground, all of which was to be held and owned as common property by the company. The plaintiff told me and the other members of the company the same thing.

41 The Avalanche ditch was completed about the 18th or 20th of September, A. D. 1871, and the water was turned into the ditch in September. It was commenced at Hellgate. All of the water in the gulch was turned in, amounting to 175 to 200 inches. I remained a member of the company until some time in A. D. 1877; up to that time we took all of the water the ditch would carry.

The plaintiff never claimed the water as his own property until a demand was made on the defendants, two or three weeks ago. I was one of the defendants in the case of Gallagher and Hornbuckle *vs.* Basey *et al.* At that time plaintiff never asserted any right. He was president of the company and Clem was secretary of the company. Plaintiff cultivated the ranch in the year A. D. 1871, and agreed to pay for water. He used surplus water in 1871 until July, after which time the water ran down the gulch. After that time when he got the water he came to the company first and told them he would pay for the water. He made no claim that he had an individual right to the water, or that he was not to pay for the same. In the year A. D. 1872 he paid $1,000.00 for the
42 ranch and the water. In 1873 he paid $2.50 per acre He used the water by the consent of the company. In 1874 and 1875 he rented the ranch. In 1872 there was 280 inches of water in Avalanche gulch. The springs furnished the Avalanche ditch with fifty to sixty inches of water."

Cross-examination:

"The company was organized in June A. D. 1869, and was

known as the Hellgate and Avalanche Ditch Company. This was the first organization. The mining ground we put in paid over expenses. The best clean up was $11.00 to $12.00 per day. We stopped on account of water; the best clean up was about $1,100. The company bought a half interest in the Hellgate water from Hornbuckle and Marshall. Some years there were 300 to 500 inches of water in Hellgate gulch. In 1874 the plaintiff farmed and used the water by consent of the company; in 1875 the same; in 1876 he used White's gulch water; he only used the water when he asked for it and said that his crops were suffering for the want of water."

Re-direct examination:

43 "He said his crops were suffering, and that he *he* wanted the water for a few days, and I let him have it from 12 m. to 8 p. m."

R. B. LOOMIS testified as follows, to wit:

I know the parties plaintiff; have known them since the year A. D. 1876. I know the Avalanche gulch water. I was a member of the Hellgate and Avalanche Ditch Company in November, A. D. 1872; I succeeded James Vanderbarker.

The deed from Cahill was here shown the witness. The same was identified and read in evidence, and is as follows, to wit:

Deed from Cahill to Stafford.

Know all men by these presents, that for and in consideration of the sum of $600.00, six hundred dollars, to me in hand paid, the receipt whereof is hereby acknowledged, have this 1st day of July, A. D. 1870, bargained and sold, and by these presents doth bargain, sell, and convey unto J. V. Stafford, all our right, title, and interest in and to that tract or portion of land, being (160) one hundred and sixty acres, more or less, situated in the county of Meagher, Territory of Montana, known and described as follows, viz: Lying
44 and being situated on what is known as Avalance Gulch, and better known as the Cahill and Allen tract of land; together with all improvements thereon, and two water ditches, and all water rights thereunto belonging or in anywise appertaining.

In witness whereof we have hereunto set our hands and seals, the day and year first above written.

JEREMIAH CAHILL. [SEAL.]

Witness:
R. B. LOOMIS,
JAMES VANDYHOSKY.

"I was living in the neighborhood when the ditch was started. From the time I became a member of the company, the Avalanche gulch water has always been used in the ditch. The Basey ranch was the property of the company; it was rented by the plaintiff;

he paid $300.00 in 1873 for the use of the water; he was president of the company while I was a member. Plaintiff never, until 1875, claimed to have any individual right to the water; this was in December. The company always controlled the waters of Avalanche gulch while I was a member of the company. In the year
45 A. D. 1876, Mobley had charge of the ditch; in 1877, J. Fischer had charge; both were under instructions from the company to see that all of the water was turned into the ditch, and to see if accidents to the ditch occurred."

AL. MOBLEY testified as follows:

"I know the parties and the ditch; I was employed by the company on the ditch in the year A. D. 1872; I was mining; I attended to the ditch in 1876; the Avalanche gulch water all flowed into the ditch until after the freshet; my instructions were to attend to the ditch and allow no person to take water out; the reason that water was not used in the ditch after the freshet was, that there was enough in Mapgie gulch; that year the plaintiff got his water from White's gulch."

JACOB FISCHER testified as follows, to wit:

"I have known the ditch and the parties since the year A. D. 1870; I was the ditch tender in 1877; the Avalanche gulch water was used for mining purposes; no water was turned out to the plaintiff that season; last July the water of the gulch was
46 all conveyed in the ditch, except the leakage from the pipe."

Cross-examination:

"Stafford farmed in the year of 1877; he had the use of the surplus water that would not go through the pipe; no water run down after July, except the leakage from the pipe."

Redirect examination:

"The leakage would amount to 15 or 20 inches 3 or 4 miles above the ranch."

The defendants here offered in evidence the complaint and answer in the case in which the decree introduced in evidence by the plaintiff was rendered. To which plaintiff objected, and the objection was sustained by the court, to which ruling the defendants then and there duly excepted.

(Said complaint and answer being preserved in the bill of exceptions signed by the judge, and which is to be hereinafter inserted.)

The defendant then proved and read in evidence a deed from plaintiff and wife to the defendants, dated the 30th day of March, A. D. 1878, which said deed is marked Exhibit "B," and is in the words and figures following, to wit:

47 EXHIBIT "B."

This indenture, made the 30th day of March, in the year of our Lord one thousand eight hundred and seventy-eight, between Jo-

seph V. Stafford and his wife, Minnie B. Stafford, of Meagher county, Montana Territory, the parties of the first part, and Samuel Marshall and James Hornbuckle, of the same place, the parties of the second part, witnesseth: That the said parties of the first part, for and in consideration of the sum of five hundred dollars lawful money of the United States of America, to them in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, have remised, released, and forever quit-claimed, and by these presents do remise, release, and forever quit-claim unto the said parties of the second part, and to their heirs and assigns, all the following described property, to wit: Being an undivided four fifteenths interest in all the property known as the Hellgate and Avalanche Ditch Company, consisting of a ditch leading from Avalanche gulch to the Cave Gulch foot hills, and all mines and water rights belonging to said company; also all pipe and
48 and other tools of said company, said property being situated in Meagher county, Montana Territory. This deed shall not be so consstrued as to affect individual rights to waters in Avalanche gulch.

Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining; and the reversion and reversions, remainder and remainders, rents, issues, and possession and profits thereof. To have and to hold all and singular the said premises, together with the appurtenances, unto the said parties of the second part, and to their heirs and assigns forever.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

J. V. STAFFORD. [SEAL.]
MINNIE B. STAFFORD. [SEAL.]

Signed, sealed, and delivered in the presence of—
L. ROTWITT.

TERRITORY OF MONTANA, } ss:
County of Meagher. }

49 On this 30th day of March, A. D. eighteen hundreed and seventy-eight, before me, a notary public for the county of Meagher, Territory of Montana, personally appeared J. V. Stafford and Minnie B. Stafford, his wife, who were examined by me separately and apart from each other, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office, in the county of Meagher, Territory of Montana, the day and year in this certificate first above written.

L. ROTWITT,
Notary Public.

Endorsed: Filed for record April 1, 1878, at 4 o'clock p. m.,

and recorded in book "F" of deeds, on page 150. T. E. Collins, recorder.

Also, a deed from defendants to plaintiff of the same date, and which is as follows, to wit:

EXHIBIT "C."

Deed from Defendants to Plaintiff.

This indenture, made the 30th day of March, in the year
50 of our Lord one thousand eight hundred and seventy-eight, between James Hornbuckle and Samuel Marshall, of Meagher county, Montana Territory, the parties of the first part, and J. V. Stafford, of the same place, the party of the second part, witnesseth: That the said parties of the first part, for and in consideration of the sum of two hundred dollars, lawful money of the United States, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have released, remised, and forever quit-claimed, and by these presents do remise, release, and forever quit-claim unto the said party of the second part, and to his heirs and assigns, all the following described property, to wit: All our right, title, and interest, consisting of a two-thirds (⅔) interest in what is known as the White's gulch ditch, leading from said White's gulch to Avalanche gulch; also, what is known as the Basey ranche and improvements, situate on Avalanche gulch, consisting of fencing, buildings and ditch. It being distinctly understood that this deed conveys no water right now owned by the Hellgate and Ava-
lanche Ditch Company; and this shall not in anywise be so
51 construed as to affect the private rights of individuals owning water rights in Avalanche gulch. Together with all and singlar the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, possession, and profits thereof.

To have and to hold, all and singular, the said premises, together with the appurtenances, unto the said party of the second part and to his heirs and assigns forever.

In witness whereof the said parties of the first part have hereunto set their hands and seals, the day and year first above written.

SAMUEL MARSHALL.
JAMES HORNBUCKLE.

Signed and delivered in the presence of—
L. ROTWITT.

TERRITORY OF MONTANA, }
County of Meagher, } *ss.*

On the thirtieth day of March, A. D. eighteen hundred and seven-
ty-eight, before me, a notary public for the county of
52 Meagher, Territory of Montana, personally appeared Samuel Marshall and James Hornbuckle, known to me to be the persons whose names are subscribed to the within instrument, and

acknowledged to me that they executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in the county of Meagher, Territory of Montana, the day and year in this certificate first above written.

[SEAL.] L. ROTWITT,
Notary Public.

Endorsed: Filed for record April 1, 1878, at 4½ o'clock p. m., and recorded in "Book F" of deeds, on page 151. T. E. Collins, Co. recorder.

JAMES HORNBUCKLE was then placed on the stand as a witness, and testified as follows, to wit:

"I was present when the two deeds were executed."

The witness was asked the following question:

"What, if anything, was said at the time as to the plain-
53 tiff's claim of any individual right to the water of Avalanche gulch at the time of the execution of the deeds?"

The question was objected to by the plaintiff; the court sustained the objection, and the defendants then and there duly excepted.

The defendants then offered to prove by the witness that no claim of any kind, or any assertion of any individual right to any of the water of Avalanche gulch was made by the plaintiff; but the court refused to allow such evidence to be introduced, and the defendants then and there duly excepted.

Witness then further testified as follows:

"I have been acquainted with Magpie creek since the year A. D. 1866. I have two ditches in Magpie gulch aside from the Avalanche ditch, one of them is about four hundred yards above where Avalanche ditch taps Magpie, the other is one-half or three-quarters of a mile to where we take water in the upper ditches. About fifty or sixty inches of water flow from Magpie into the Avalanche ditch just below the springs.

54 Toombs has a decree for seventy inches of water below Cave gulch ditch. The Avalanche ditch has used it, and Toombs has claimed it."

The defendants rest.

The plaintiff then recalled J. V. STAFFORD, who testified as follows, to wit:

J. V. STAFFORD, recalled:

"In 1869 I had a water right of seven-twelvths of Magpie creek. Fischer and Hendrickson had five-twelvths. The Warner's & Clapper had mining ground in Cave gulch. I put in my seven-twelvths for an equal interest in the mines in Cave gulch. I found the water in Hellgate ditch too light in quantity in the spring of A. D. 1870. The organization was called and known as the Hellgate Ditch Company, until the month of July, A. D. 1870, when we con-

cluded to run on to the Avalanche gulch. In July, A. D. 1870, the company wanted I should buy out the Cahill water right for them. The deed was taken in my name so that Cahill would not suspect that it was for a mining company.

The deed was here introduced and read in evidence, of which said deed, in words and figures, the following is a copy, to wit:

55 *Deed.—Jeremiah Cahill to J. V. Stafford.*

Know all men by these presents, that, for and in consideration of the sum of $600.00 six hundred dollars to me in hand paid, the receipt whereof is hereby acknowledged, I have this day bargained, this 1st day of July, A. D. 1870, *bargained* and sold, and by these presents doth bargain and sell and convey unto J. V. Stafford, all our right, title, and interest in and to that tract or portion of land, being (160) one hundred and sixty acres, more or less, situated in the county of Meagher, in the Territory of Montana, known as and described as follows, to wit, lying and being situated on what is known as Avalanche gulch, and better known as the Cahill & Allen tract of land, together with all improvements thereon, and two water ditches, and all water rights thereunto belonging or in anywise appertaining.

In witness whereof, we hereunto set our hands and seals, the day and year first above written.

JEREMIAH CAHILL. [SEAL.]

Witness:
R. B. LOOMIS.
JAMES VANDYLORKY.

56 The Hellgate and Avalanche Ditch Company was composed of myself, S. Clem, I. Clem, O. C. Warner, W. O. Warner, and H. Clapper.

The Hellgate and Avalanche Ditch Company was organized in July, A. D. 1870. The entire thing cost about $18,000.00. We bought the Cahill water right on the 1st of July, A. D. 1870. I do not know how many inches of water. After the suit was commenced we bought out Basey before any one knew where we were going to run over, because we were thus enabled to buy it cheaper. The Avalanche ditch was to have the surplus water over and above what Basey would use, and when he got through with it we had made arrangements with him to get it.

Nothing was said at the time the company was organized about the thirty-five (35) inches of water. During the water season there is from 500 to 1,500 or 2,000 inches of water in Avalanche gulch. The Cahill ditch was a large ditch; it carried all the water in the gulch; it ran a little way and then ran back into the gulch.

In the year A. D. 1869 I farmed in the Missouri valley.

57 In the month of September, A. D. 1870, the water was taken into the mining ditch after irrigating season was past. The head of the Basey ditch is a mile below the head of Avalanche ditch. I used some of the water in A. D. 1871. I used more than one inch

to the acre, because it benefited myself and the company to do so. The company never made any claim to the thirty-five (35) inches of water. In the year A. D. 1872, I farmed the Basey place. I paid $1,000.00 for the rent of the place and all the water I wanted. We had no controversy or dispute that year about the thirty-five inches of water. In the year A. D. 1873 I farmed the same place. I then had all the water I wanted. I paid $300.00. In A. D. 1874 I used the water. I was entitled to thirty-five inches of the water. In the year A. D. 1875 the same. The company never contested my individual right to the thirty-five (35) inches of water, but always recognized the same. In the month of December, A. D. 1875, I offered to sell to the ditch company my entire right and interest therein for the sum of eight hundred ($800) dollars. Loomis brought the deed
58 to me conveying all my right, title, and interest in it, and in the White and Tower ditch. I told him I would not convey my right to the White and Tower ditch. I regard it of more value than my interest in the Avalanche ditch. I have never parted with my right to the thirty-five inches of water. The first I knew that the company claimed the water was in the latter part of March, A. D. 1878. I told Marshall he could regulate my right. Marshall said he did not recognize any right; if I had any I must get it through the courts. I heard Warner's and Clem's testimony at the time of the law suit. Basey's right belonged to the company; it was deeded to me for the benefit of the company; there was no agreement between myself and the company in relation to the thirty-five inches of water. I set up my claim to the water of White and Tower ditch when the suit was brought, and it came up in that way. I had no conversation with Warner in reference to the thirty-five inches of water after the decree was rendered. I had no conversation with Clem."

Cross-examination:

"In the month of May, A. D. 1869, the company made ar-
59 rangements to construct the Hellgate ditch. We commenced in the spring and finished in the spring of A. D. 1870, to cave gulch. They then made arrangements to extend the ditch to Avalanche gulch, and to acquire further water rights. This was the last of June or the first of July. It was agreed by the company to buy the Cahill water right. We bought the Basey claim in the winter of A. D. 1871. I never saw the deed, and never had it in my possession. I was president of the company and Clem was its secretary. The deed was executed to the entire company. A mortgage was given; I think all the members of the company signed it; I know that I signed it. I don't remember that I signed it as president of the company; think it probable that I did so sign it. Nothing was said about the company having the White & Tower water right by Clem, the Warners, and Vandebarke, at the time of the organization of the company. They were mistaken when they said so. The Gallagher suit was not commenced until we turned the water into the ditch. I claimed all the water to the extent of the amount that would fill

the ditch. In that suit I set up my claim to the White and
60 Tower ditch water. I always claimed it. I don't know that I ever said anything to the members of the company about claiming the thirty-five inches of water, or they to me. Clem and Warner never said anything to me about the decree being taken in my name. When I wanted water to irrigate with, I told of it, and then went and turned out all I wanted. I never had any such conversation as Warner has related about getting the water for a few days. The Avalanche ditch carried about 300 inches of water. The lowest stages of water in the gulch are in the months of August and September; at those times there are from 100 to 300 inches of water. I bought an interest in Maggie gulch from Leighton, Smith and Company. I put into the company seven-twelfths in the year A. D. 1869. The company bought out the other five-twelfths. I was one of the company that bought the $\frac{5}{12}$; was not bought by the other members. The statement to Warner in the year A. D. 1875, when I refused to sign the deed to him and Loomis, is all the conversation I ever had on the subject with any member of the company.

61 L. ROTWITT, testified as follows, to wit:

"I live at Cannyon Ferry; I have been acquainted with W. O. Warner, Loomis, Clem, and O. C. Warner, since the year A. D. 1872; I keep the ferry and a hotel; these parties reside a couple of miles from my place; they used to frequent the ferry once or twice a week; I also kept a billiard saloon two miles from the ferry, in Cave gulch, in the years A. D. 1873 and 1874; I have had frequent conversations with the members of the company in the years A. D. 1872, 1873, 1874, and in 1875, about the thirty-five inches of water."

Question. State what was said, and by whom, at the times you have mentioned, in reference to the thirty-five inches of water in controversy.

Defendants objected to the question, which objection was overruled by the court, to which ruling of the court the defendants then and there duly excepted.

Answer. I heard it said that it was Stafford's individual water right by Loomis, W. O. Warner, and O. C. Warner.

The defendants duly excepted to the answer.

62 Question. Did you hear any conversation in the years A. D. 1874 and 1875 between Loomis and W. O. Warner in reference to the decree that was rendered?

Defendants objected to the question; the court overruled the objection, and the defendants then and there duly excepted.

Answer. Sometime during the year 1874 or 1875, just after the decree was confirmed in Washington, Mr. Loomis and W. O. Warner came from Helena and stopped at my house for a few hours; Loomis told me that Colonel Sanders told him in town that Horn-

buckle beat him, and talked the matter over, and both of them said it did not make so much difference after all; that Stafford had thirty-five inches of water, or its equivalent, above the White and Tower ditch, and they thought they could easily arrange with him.

The answer was objected to; the objection was overruled by the court and the defendants duly excepted at the time.

"In December, A. D. 1875, Loomis drew up a deed for the plaintiff to sign; I did not look over the instrument, but heard
63 Stafford remark that he could not sign it; that he only intended to sell his right to the Avalanche ditch; Loomis said (both getting excited) then you don't intend to include your individual right, or the White & Tower right, as I understood it; Stafford said he did not think of disposing of that right; I heard them speak frequently of Stafford's right to the water, times too numerous to mention."

Cross-examination.

"I do not know as I am on the very best terms with the members of the Avalanche Ditch Company at this time. They are not very friendly with me, and have not been for a year or more past. I feel friendly to Hornbuckle and Marshall. I do not admire them, and have told them so. I had a controversy with Marshall about the water of Hellgate. I am in with Oaks. Oaks claimed all the water his ditch would hold. I knew that Stafford conveyed one-half to the defendants. I wrote the notice to Hornbuckle and Marshall. I can't tell at what time or place I had the conversations which I have related with Loomis. In the years A. D. 1873 and 1874 I was
64 at Cave gulch. The year before that time I was at Cannion Ferry. I frequently had conversations while I kept a saloon in Cave Gulch. The suit was the topic of conversation. The only time I distinctly recollect conversation with Warner was when he came from Helena, which I think was in the year A. D. 1875. I don't remember that in that conversation they spoke of the White and Tower water right. It was called Stafford's right. I can't remember that any one else was present at conversation."

JOEL FRICK testified as follows:

"I know the Hellgate and Avalanche Ditch Company. I first heard of the Hellgate and Avalanche Ditch Company in the fall of 1870. I worked for the plaintiff in the year A. D. 1869, up to about the 5th day of May A. D. 1870—13 months. The Warners, Clems, Clapper, and Vandebarker were at work."

Question. Did you hear any talk among the members of that company as to the contract or agreement by which the plaintiff became a member of it?

The defendants objected to the question. The court overruled the objection, to which ruling the defendants, at the time, duly excepted.

65 Answer. I did hear some talk about it. They said plain-

tiff had an interest in Magpie, and had put that interest into the company for an interest in the company. Up to the 5th or 6th of May, A. D. 1870, it was called the Hellgate Ditch Company. The Warners, brothers, made a preliminary survey from Hellgate to Avalanche. Some of them were in favor of, and some against it. In July or August, A. D. 1870, they concluded to dig the Avalanche ditch. They had not agreed to construct the ditch up to the time I left. I worked for the company in the year A. D. 1874. Stafford that year was using Avalanche water. He got it from Avalanche creek."

Cross-examination:

"In A. D. 1874, I worked for the company some 40 or 50 days on Shcafer gulch, at the Cave Gulch foot hills. The company were using water at cave. Chinamen used one shift and the company used the water—the other. After I quit work I stopped with Stafford at the ferry 2 or 3 weeks. O. C. Warner told me, in July, 1869, that they were going to dig the ditch. I don't know when they concluded to do it. Warner made a survey 3 or 4
66 weeks after the Hellgate ditch was commenced, before July 4th, 1869."

H. H. CONABLE testified as follows, to wit:

"I know the Hellgate and Avalanche ditch. I helped dig a portion of the ditch in the month of December, A. D. 1869. If I remember right, it was called the Hellgate Ditch Company, in July, A. D. 1870; called Hellgate and Avalanche Ditch Company."

JOSEPH BLACKWELL testified as follows, viz:

"I knew the Hellgate and Avalanche ditch in the year A. D. 1870. I have known Stafford since the month of April, 1866. Have been farming Basey ranch. He (Stafford) used Avalanche ditch water."

Question. State whether you ever heard any of the Hellgate and Avalanche Ditch Company say anything in reference to the thirty-five inches of water in controversy; if so, what was it?

Defendants objected to the question; the court overruled the objection, and the defendants at the time duly excepted to the ruling of the court.

Answer. "I heard them say that Stafford had a right to
67 thirty-five inches of the water. This was about the time of the Gallagher suit."

Defendants also saved, in due form, and exception to the answer of the witness.

Cross-examination:

"The company were defending the suit. The talk was about the time of the trial, and they said Stafford had this right to thirty-five inches of the water."

JOSEPH NEIHORN testified as follows, viz.:

"I know the Hellgate and Avalanche ditch. I worked on it in the month of July, A. D. 1870. I know the company. I worked for them off and on in the year A. D. 1870. I heard M. O. Warner and Loomis say that Stafford was entitled to thirty-five (35) inches of water in Avalanche gulch in the year A. D. 1873 or in 1874."

The above evidence was received under objection by defendants, which was overruled by the court; to which ruling the defendants then and there and at the time duly excepted.

"Stafford used the Avalanche water to irrigate every season, so far as I know."

Cross-examination:

68 "I remember the Gallagher suit. The company had a law-suit; they said that Stafford, under a decree of the court, was entitled to thirty-five inches of the water. W. O. Warner was at work in the diggings. He said that Stafford wanted water; it was turned out to him a number of shifts; I do not know how many night shifts were cut off."

JOHN TOOMBS testified as follows, viz.:

"I know the Hellgate and Avalanche Ditch Company; have known it since the year A. D. 1870; before the latter part of 1870 it was called the Hellgate Ditch Company."

The same question was here asked the witness as had been asked of Rotwitt and others as to the declarations of members of the company in reference to the 35 inches of water, and was objected to by the defendants; the objection was overruled and exception duly taken.

Answer. I always heard them call the 35 inches Captain Stafford's water. At the time the deed was tendered by Loomis, on the 23rd day of December, A. D. 1875, Loomis came to my house and asked me to take a letter to Diamond; that Stafford had
69 backed out and would not sell the 35 inches of water and White's gulch water. W. O. Warner, at Diamond, read the letter and showed it to me. He told me that Stafford had backed out or down and would not sell the thirty-five inches of water and White's gulch water."

Cross-examination:

"I never heard Clem say anything about the water. Warner called it Stafford's water. I was a witness in the Gallagher case. I heard them call it Stafford's water. I am not friendly with the defendants; I have been litigating with them for the period of ten years. In our litigation Stafford has always been a witness for me."

The plaintiff here rested.

Thereupon the defendants recalled R. B. LOOMIS, who was asked the following question, viz.:

"Did you ever at any time or place since the Gallagher suit state to L. Rotwitt that Stafford owned the thirty-five inches of water, individually, either in the years 1872, 1873, 1874, or 1875?"

Answer. "I have no doubt that I have talked with him about the matter, and that whenever we did speak about the water we talked of it as the water decreed to Stafford. I never did
70 acknowledge to him or any one that it was Stafford's water individually. I told him that the Messrs. Hornbuckle and Marshall had beat us in the Supreme Court of the United States, but that it would not affect us materially, as under the decree it would take 250 inches to run the ditch, and that we had that amount. In conversations we only spoke of the water as the water given to Stafford by the decree, and it was always alluded to in that way."

Cross-examination:

"I went to Helena, at the request of the defendants, and gave information when the answer was drawn. I am friendly with Mr. Stafford now; I never had any difficulty with him. I am as friendly with him as with others in the neighborhood."

W. O. WARNER testified as follows, viz.:

"I have known L. Rotwitt since the year A. D. 1872. I have no recollection of ever saying that it was Stafford's individual water. The decree ran to Stafford, and it was so spoken of. I was at the ferry when I came from Helena; did not say it was Stafford's
71 water, and that we could make satisfactory arrangements with him; don't recollect ever having the conversation in Diamond which was mentioned or spoken of by Mr. Toombs. I would have remembered it if such conversation had taken place."

Cross-examination:

"I have always been on friendly terms with the plaintiff up to the time we tried to buy him out. I have no interest in the event of this suit."

O. C. WARNER testified as follows, viz:

"I have known L. Rotwitt since the year, A. D. 1872. I never at any time in the years 1872, 1873, 1874, or 1875, said to Rotwitt that Stafford owned the thirty-five inches of water; the water was always alluded to as the White & Tower water right, or Stafford's right and Basey right."

Defendants then offered in evidence a deed from Fischer and Henderson to Clems, Warners, and Clapper, which appears in the bill of exceptions below. To the introduction of which deed the plaintiff objected; the court sustained the objection. To which ruling of the court in sustaining said objection the defendants then and there excepted.

72 The foregoing was all the evidence in the case. Thereupon the court signed the following bill of exceptions, to wit:

Defendant's Bill of Exceptions.

In the District Court of the Third Judicial District in and for the County of Meagher, Territory of Montana.

JOSEPH V. STAFFORD, Plaintiff,
vs.
JAMES HORNBUCKLE *et al.*, Defendants.

This cause came on to be tried on the 25th day of May, A. D. 1878, before the court and a jury. J. V. Stafford, plaintiff's witness, being on the stand, and having testified regarding the user by him of the water claimed in the complaint, and that it would take 150 inches of water at the Basey ditch to make 35 inches at the White and Tower ditch, was asked the following question:

State what the 35 inches of water is worth per day to you.

To which question the defendants objected; the court overruled the objection, and the defendants then and there duly excepted.

73 The witness then answered: Eight dollars per day.

The defendant also excepted to the permission of the court to answer the question, and to the answer.

On the defense the defendants offered in evidence (the plaintiffs having previously introduced the decree in the case of Gallagher *et al. vs.* Basey *et al.*) the complaint and answer in the same case. The plaintiff objected; the court admitted the same in evidence, but afterwards withdrew the same, and excluded the same from the jury, to which decision and ruling of the court the defendants duly excepted. Said papers being as follows, to wit:

Amended Complaint.

GALLAGHER *et al.*, Plaintiffs, *vs.* BASEY *et al.*, Defendants.

In the District Court, Third Judicial District, County of Meagher, Territory of Montana.

JOHN GALLAGHER *et al.*, Plaintiffs,
vs.
WILLIAM BASEY *et al.*, Defendants.

74 And now come the above-named plaintiffs, and for an amended complaint herein, show unto this honorable court and allege, that in the year A. D. 1866, they and their predecessors in interest and possession, took up certain ranches on the public lands of the United States of America, situate in the said county of Meagher and Territory of Montana, and on which is known as the Missouri river bottoms, and a short distance below a stream known as Avalanche, and that the said ranches were taken up for settlement and cultivation. And the said plaintiffs further allege that, for the purpose of raising grain, hay, and vegitables, and the successful cultivation of the said ranches, it was then, and is now, necessary to have and procure water to irrigate said ranches. And the said plaintiffs further allege that, from the year aforesaid to the

present time, these plaintiffs and their predecessors in interest and possession, have owned and occupied and cultivated, and now own and occupy the said ranches. And the said plaintiffs further allege that, at the time the said ranches were so taken up as aforesaid, the water flowing in the said Avalanche creek and gulch, were un-
75 appropriated by any person, and were subject to appropriation; and that in the said year of A. D. 1866, these plaintiffs and their predecessors located and marked out and commenced the construction of a water ditch to convey the waters flowing down the said Avalanche creek or gulch to the said ranches of these plaintiffs and their predecessors for the purpose of irrigating the same, the said waters then being unappropriated and unclaimed as aforesaid. And that during the spring of the year A. D. 1867, the said plaintiffs and their predecessors proceeded to complete and finish the said ditch at great cost and expenditure of labor and money, and thereby appropriated of the waters of said Avalanche gulch or stream for the purposes aforesaid five hundred (500) inches of water, according to miner's measurement, which amount is necessary for the successful cultivation of said ranches; that the said ditch intersected with the said Avalanche creek or gulch, and took the water therefrom a short distance above where the same empties into the Missouri river, and that from the time of the completion of the said ditch until the date of the wrongful acts of the said defendants
76 hereinafter mentioned, the said plaintiffs and their predecessors used the said water so appropriated and claimed for the purpose of irrigating their said ranches, and were thereby enabled to cultivate and raise large and valuable crops of grain, hay, and vegetables; and the said plaintiffs further allege that afterwards, to wit, on the — day of ——, A. D. 1867, and on the — day of ——, A. D. 1870, and on days intermediate said dates and subsequent to the said appropriation of these plaintiffs and their predecessors, the said defendants, well knowing the rights of these plaintiffs and their predecessors to the waters of said stream, proceeded to erect dams across the said Avalanche creek or gulch and above the head of the ditch of these plaintiffs, and to construct ditches and turn out and divert the waters of the said stream, thereby wholly depriving these plaintiffs of the use and enjoyment of the said water, to their great and irreparable damage and injury, thereby rendering the said ranches of these plaintiffs almost entirely valueless, and preventing these plaintiffs from cultivating the same.

And the said plaintiffs aver that if the said waters of the
77 said Avalanche gulch or stream had been permitted unobstructed by the said dams and ditches of the said defendants to have flowed down to the ditch of these plaintiffs, they would have had a sufficient supply of water to have irrigated their said ranches, and cultivated and raised valuable crops of grain, hay, and vegetables.

Wherefore the said plaintiffs pray that they may have judgment for their costs of action; that upon the final hearing they may be decreed a perpetual injunction against the said defendants, their servants, agents, and employés, and all persons who may claim by,

through, or under them, enjoining and restraining them from in any manner diverting or interfering with the said waters of the said Avalanche gulch or creek, except as to what may be in excess of five hundred inches at the head of plaintiff's ditch, and for such other or further relief as to the court may seem just and proper.

SAMPLE ORR,
JOHN H. SHOBER, AND
CHUMASERO & CHADWICK,
Plaintiff's Attorneys.

Verification.

78 TERRITORY OF MONTANA, } ss:
County of Lewis & Clarke, }

Sample Orr, being first duly sworn, deposes and says that he is one of the attorneys of the above-named plaintiffs; that he has heard the said amended complaint read and knows the contents thereof; that he has reason to believe, and does believe, the matters as therein stated to be true.

SAMPLE ORR.

Subscribed and sworn to before me, this 3rd day of November, A. D. 1870.

W. F. CHADWICK,
Notary Public.

EXHIBIT "E."

Answer in Gallagher et al. vs. Basey et al.

In the District Court, Third Judicial District, County of Meagher, Territory of Montana.

JOHN GALLAGHER *et al.*, Plaintiffs,
vs.
WILLIAM BASEY *et al.*, Defendants.

79 Now come the defendants in the above-entitled cause, by E. W. & J. K. Toole and J. A. Johnston, their attorneys, and for answer to the amended complaint on file in this cause, admit that plaintiffs have ranches on the Missouri river bottoms; but deny that they have cultivated them ever since the year A. D. 1866. And they deny that plaintiffs have at any time since they claim to have taken up said ranches, cultivated the same with the waters of Avalanche creek or gulch; they deny that at the time plaintiffs ranches were taken up, the waters flowing in Avalanche creek or gulch were unappropriated; and they deny that said waters were subject to appropriation at that time; they deny that in the year A. D. 1866, these plaintiffs and their predecessors located and commenced the construction of a ditch to convey the waters of Avalanche creek or gulch on to their said ranches; deny that these plaintiffs and their predecessors in interest, in the spring of the year A. D. 1877, or at any other time, finished a ditch and made

any appropriation of the waters of Avalanche creek or gulch; they deny that plaintiffs and their predecessors, in the spring of
80 the year A. D. 1867, or at any other time, appropriated five hundred (500) inches of the waters of Avalanche creek or gulch, according to miner's measurement, nor any other number of inches.

These defendants deny that plaintiffs ever dug and completed a ditch which tapped Avalanche creek or gulch, capable of carrying five hundred inches of water, nor any other number of inches; they deny that five hundred inches of water was or is necessary for the successful cultivation of plaintiffs ranches; they deny that the plaintiffs and their predecessors used the waters of the said Avalanche gulch or creek for the purpose of irregating their ranches, from the spring of the year A. D. 1867 up to the — day of ——, A. D. 1867; they deny that the plaintiffs, by the use of the said waters, were enabled to and did raise large and valuable crops of grain, hay, and vegetables on their ranches.

These defendants deny that on the day of ——, A. D. 1867, and on the — day of ——, A. D. 1870, and on days intermediate said dates, or upon any other days and times, they made any diversions of the waters of said Avalanche gulch or creek, in violation
81 of any of the rights of these plaintiffs or their predecessors; deny that plaintiffs have sustained great and irreparable damage and injury; they deny that plaintiffs' ranches have been rendered valuless; and they deny that plaintiffs have been prevented from cultivating their said ranches by reason of any wrongful act done by these defendants. Having answered, these defendants ask judgment for their costs.

E. W. & J. K. TOOLE AND
J. A. JOHNSTON,
Att'ys for Defendants.

Verification.

TERRITORY OF MONTANA, } *ss:*
County of Meagher, }

J. V. Stafford, one of the defendants in the foregoing entitled cause, and the agent for his co-defendants, makes oath and says that he has heard the foregoing answer read, and knows the contents thereof, and that he has reason to believe, and does believe, that the matters as stated therein are true.

J. V. STAFFORD.

Subscribed and sworn to before me, this 28th day of November, A. D. 1870.

T. J. DAWES, *Clerk.*

82 The defendants introduced in evidence two deeds, one of which was from plaintiff to defendants and one from defendants to plaintiff, both being dated on the 30th day of March, A. D. 1878, and which recite as follows, to wit:

Deed.—Stafford & Wife to Hornbuckle & Marshall.

This indenture, made the 30th day of March, in the year of our Lord one thousand eight hundred and seventy-eight, between Joseph V. Stafford and his wife, Minnie B. Stafford, of Meagher county, Montana Territory, the parties of the first part, and Samuel Marshall and James Hornbuckle, of the same place, the parties of the second part, witnesseth: that the said parties of the first part, for and in consideration of the sum of five hundred dollars, lawful money of the United States of America, to them in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, have remised, released, and forever quit-claimed, and by these presents do remise, release, and forever quit claim unto the said parties of the second part, and to their heirs and as-
83 signs, all the following described property, to wit: Being an undivided four-fifteenths interest in all the property known as the Hellgate and Avalanche Ditch Company, consisting of a ditch leading from Avalanche gulch to the Cave Gulch foot-hills, and all mines and water rights belonging to said company; also all pipe and other tools of said company; said property being situated in Meagher county, Montana Territory. This deed shall not be so construed as to affect individual rights to waters in Avalanche gulch.

Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, possession, and profits thereof. To have and to hold all and singular the said premises, together with the appurtenances, unto the said parties of the second part, and to their heirs and assigns forever.

In witness whereof the said parties of the first part have hereunto set their hands and seals, the day and year first above written.

J. V. STAFFORD. [SEAL.]
MINNIE B. STAFFORD. [SEAL.]

Signed, sealed, and delivered in the presence of—
L. ROTWITT.

84 TERRITORY OF MONTANA, } ss:
County of Meagher. }

On this thirtieth day of March, A. D. eighteen hundred and seventy-eight, before me, a notary public for the county of Meagher, Territory of Montana, personally appeared J.V. Stafford and Minnie B. Stafford, his wife, who were examined by me separately and apart from each other, known to me to be persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal at my office, in the county of Meagher, Territory of Montana, the day and year in this certificate first above written.

[SEAL. R. ROTWITT,
Notary Public.

Endorsed: "Filed for record April 1, A. D. 1878, at 4 o'clock p. m., and recorded in Book F of deeds on page 150." T. E. Collins, county recorder.

85 EXHIBIT "C."

Deed.—Hornbuckle et al. to Stafford

This indenture made the 30th day of March, in the year of our Lord one thousand eight hundred and sexenty-eight, between James Hornbuckle and Samuel Marshall, of Meagher county, Montana Territory, the parties of the first part, and J. V. Stafford, of the same place, the party of the second part, witnesseth: that the said parties of the first part for and in consideration of the sum of two hundred dollars lawful money of the United States to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have released, remised, and forever quitclaimed, and by these presents do remise, release, and forever quitclaim unto the said party of the second part, and to his heirs and assigns, all the following described property, to wit: All our right, title, and interest, consisting of a two-thirds (⅔) interest in what is known as the White's gulch ditch, leading from said White's gulch to Avalanche gulch; also what is known as the Basey ranche and improvements, situate on Avalanche gulch, consisting of fenc-
86 ing, buildings, and ditch. It being distinctly understood that this deed conveys no water right now owned by the Hellgate and Avalanche Ditch Company, and this shall not in anywise be so construed as to affect the private rights of individuals owning water rights in Avalanche gulch, together with all and singular the tenements, hereditiments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and possession, and profits thereof: to have and to hold all and singular the said premises, together with the appurtenances unto the said party of the second part, and to his heirs and assigns forever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

SAMUEL MARSHALL.
JAMES HORNBUCKLE.

Signed and delivered in the presence of—
L. ROTWITT.

Acknowledgement.

87 TERRITORY OF MONTANA, } ss:
County of Meagher. }

On this thirtieth day of March, A. D. eighteen hundred and seventy-eight, before me, a notary public for the county of Meagher, Territory of Montana, personally appeared Samuel Marshall and James Hornbuckle, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me

that they executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my and affixed my official seal, at my office, in the county of Meagher, Territory of Montana, the day and year in this certificate first above written.

[SEAL.] L. ROTWITT,
Notary Public.,

Endorsed: "Filed for record April 1st, A. D. 1878, at 4½ o'clock p. m., and recorded in Book "F" of deeds, on page 151." T. E. Collins, Co. recorder.

88 The witness, JAMES HORNBUCKLE, one of the parties to said deeds, having testified that he was present when they were executed, was asked the following question:

"What, if anything, was said at the time by Stafford as to any individual claim of Stafford to rights in the Avalanche gulch water"?

The plaintiff objected to the question, and the court sustained the objection, to which ruling of the court the defendants then and there duly excepted.

The defendants then offered to prove by said witness that nothing was said by Stafford, or any of the parties, in regard to any individual right of Stafford to the thirty-five (35) inches of water. The court excluded the proposed evidence, and denied permission to defendants to make the proofs, and the defendants duly excepted thereto.

After the defendants had rested, the plaintiff produced as a witness, L. Rotwitt, who having testified that he was acquainted with W. O. Warner, O. C. Warner, R. B. Loomis, and that he (the witness) kept the ferry and hotel at Canion ferry, and that said
89 parties were frequently at his house, and at a saloon kept by him in Cave gulch, two miles distant, and that he had frequently conversed with them in 1872, 1873, 1874, and 1875 about the thirty-five (35) inches of water, was asked the following question:

"State what was said, and by whom, at the times you have mentioned, in reference to the thirty-five (35) inches of water in controversy?"

To which the defendants objected, on the ground that it was incompetent and not rebuttal. The court overruled the objection and the defendants then and there duly excepted.

The witness then answered:

"I heard it said that it was Capt. Stafford's individual right, by Loomis, and by W. O. Warner, and O. C. Warner."

The defendants also objected to the answer, and duly saved an exception thereto.

The plaintiff then asked the witness:

Did you have any conversation in A. D. 1874 and 1875, between

Loomis and W. O. Warner, in reference to the decree that was rendered in the Gallagher & Basey case?

90 To which the defendants objected. The court overruled the objection and the defendants at the time duly excepted. And the court also overruled defendants' objection to the answer, and defendants duly excepted thereto.

The answer being as follows:

"Sometime during A. D. 1874 and 1875, just after the decree was confirmed in Washington, Mr. Loomis and W. O. Warner came from Helena and stopped at my house for a few hours. Loomis told me that Col. Saunders told him in town that Hornbuckle and Marshall had beat them, and talked the matter over, and both Loomis and Warner said it did not make so much difference after all, that Stafford had 35 inches at the head of the White & Tower ditch or its equivalent above; and they thought they could easily arrange with him. In December, A. D. 1875, Loomis drew out a deed for Capt. Stafford to sign. I did not look over the instrument, but heard Stafford remark that he would not sign it; that he only intended to sell his right to the Avalanche ditch. Loomis said, (both getting excited,) then you don't include your individual right, or the White & Tower right, as I understood it."

91 The plaintiff then called Joel Flick, who was asked the following questions:

"Did you have any talk among the members of the Avalanche Ditch Company as to the contract or agreement by which the plaintiff became a member of it?"

To which question the defendants objected; which objection was overruled by the court, and the defendants at the time duly excepted.

The witness answered:

"I did have some talk about it; they said Stafford had an interest in Magpie, and put that into the company for an interest in the company."

The answer was also objected to, and exception duly taken by defendants.

The same question was also asked of the witness Joseph Blackwell; also of the witness John Toombs, and answered by them, said Toombs answering as follows:

"I always heard them call the 35 inches Stafford's water; on the 23d day of December, A. D. 1875, Loomis came to my house and asked me take a letter to Diamond to W. O. Warner; that Stafford had backed out, and would not sell the 35 inches of
92 water and the White gulch water; I took the letter to W. O. Warner in Diamond; he told me that Stafford had backed out and would not sell the 35 inches and the White gulch water."

The defendants, after the plaintiffs had finally rested their case, introduced witnesses; and O. C. Warner being upon the stand, and

having testified in the case, a deed from P. Hendrickson and Jacob Fischer, dated the 26th day of July, A. D. 1839, to W. O. Warner, O. C. Warner, S. Clem, I. Clem, and H. Clapper for $\frac{5}{12}$ of the water of Magpie and Leighton ditches, was shown to the witness and identified by him as being the original deed for said $\frac{5}{12}$ interest; and the defendants then offered to read the same in evidence, and which said deed is as follows, to wit:

Deed.

HENDRICKSON *et al.* to WARNER *et al.*

Dated July 26th, A. D. 1869.

93 [Blank page. Copy of deed omitted.]

94 The plaintiff objected to the introduction of said deed. The court sustained the objection, and the defendants duly excepted, and ask the court to sign this bill of exceptions, and that the same be made part of the record in this cause, which is done this 26th day of April, A. D. 1878.

D. S. WADE, *Judge.*

The cause was then submitted, and the court, at the request of the plaintiff, gave to the jury the following instructions:

Plaintiff's Instructions.

3d Judicial District Court.

JOSEPH V. STAFFORD, Plaintiff,
vs.
JAMES HORNBUCKLE and SAMUEL MARSHALL, Defendants.

1. The defendants in this case claim the right to the thirty-five inches of water in controversy upon two grounds, to wit: 1. That it was put into the Hellgate and Avalanche Ditch Company for a valuable consideration as a part of its common property. 2d.
95 That they are entitled to it by adverse possession under the statute of limitation of this Territory. Given.

2. Upon the first proposition, if the plaintiff has shown that he was the owner of and entitled to the possession and use of this water for irrigating purposes, the law presumes that such right continues until it is shown to your satisfaction by the defendants that he parted with the same. There is no evidence that there was any agreement that Stafford was to take a decree for the 35 inches of water for the benefit of the company, but it is claimed that this trust is created because of an agreement to contribute it to the common property of said company. If he did not, there is no trust created by said decree and no evidence that it was taken for the benefit of said company; and you cannot find for the defendants upon this point unless you find that said property was so to be put in as common property. No other agreement is sought to be shown. Given.

96 3. As to the statute of limitations: A party may acquire a right to water by adverse possession, for mining purposes,

and another for agricultural or irrigating purposes. Hence you will, in considering this question, consider how and when said water was used by the respective parties. If defendants used it adversely for mining purposes, and plaintiff used it adversely for irrigating and farming purposes during the alleged adverse possession by defendants, then the statute of limitations do not run against plaintiffs, so far as any right he may have had to use the same for agricultural and irrigating purposes is concerned. Given.

4. As to the first proposition, unless you find that there was an agreement made by plaintiff with the Hellgate and Avalanche Ditch Company, by which he was to put in said 35 inches of water as common property for the common benefit of said company, including his right to use the same for agricultural and irrigating purposes, you cannot find that the plaintiff held it for the benefit of said company. If, however, you find that his right to said property
97 for agricultural or irrigating purposes was never conveyed or contributed to the common property of said company, then you will find that he never had said right for said purpose for the benefit of said company. Given.

5. It is not claimed that any written conveyance of this water was ever made by the plaintiff in this action, and it devolves upon the defendants to show to your satisfaction that said property was put into the company property, or was their common property by some arrangement between the parties. Given.

The court instructs the jury that they are exclusively the judges of the facts and of the credibility of the witnesses. You are at liberty to credit or discredit any of the witnesses you may see fit; and in judging of the credibility of witnesses or of testimony you need not be governed by numbers alone. It sometimes happens that a fact is sworn to by a single witness, and the same thing denied by two or three witnesses on the other side, and yet the testimony of the single witness, by reason of its being corroborated by other facts or circumstances established in the case, is of more
98 weight and better entitled to belief than that of the several witnesses who have testified to the contrary. Given.

Upon the main issue in the case, to wit, the ownership of the particular thirty-five inches of water in controversy, the defendants having admitted the legal title of the same to be in the plaintiff, and asserting that they are equitably entitled to it, by reason of a transfer of it to the Hellgate and Avalanche Ditch Company in the year A. D. 1869, really hold the affirmative of the issue, and are not entitled to a verdict at your hands, unless they have established to your satisfaction, by a preponderance of testimony, that such transfer was actually made. That is to say, if it is admitted in the pleadings or proved to your satisfaction that the legal title to this water is in the plaintiff, then the defendants, in order to maintain their defense, must show their equitable title, and that the plaintiff is trustee for them, by a preponderance of evidence. Given.

To the giving of each one of which said instructions the defendants then and there and at the time duly excepted.

99 The defendants then asked the court to give the following instructions, viz.:

Defendants' Instructions.

In the District Court, 3d Judicial District, Lewis and Clarke County, Montana Territory.

JOSEPH V. STAFFORD, Plaintiff,
vs.
JAMES HORNBUCKLE and SAMUEL MARSHALL, Defendants.

1. The jury are instructed that it devolves upon the plaintiff to establish his case by a preponderance of evidence, and if he has failed so to do, the jury should find for the defendants. Given.

2. The plaintiff in this case bases his right to recover upon the grounds that he is, and for a long time has been, the owner of, and of the water described in the decree introduced in evidence in this case awarding him 35 inches of the waters of Avalanche gulch as against Gal-
100 lagher, Hornbuckle, and Marshall. The defendants deny that he was at the time of the rendition of said decree, or now is, the owner of said water, and claim that said water at the time of the rendition of said decree was the property of the Hellgate and Avalanche Ditch Company. That it ever since has been, and now is, the property of said company; and it is conceded by the plaintiff that the defendants are the owners of all of the property belonging to the Avalanche Ditch Company, and if the jury believe from the evidence that previous to the rendition of the decree the plaintiff contributed the said waters mentioned in the decree as company property, and became a member of the Hellgate and Avalanche Ditch Company, and said water mentioned in said decree was in fact a part and portion of the common property of said company, then the plaintiff cannot recover in this action, and your verdict should be for the defendants. Given.

3. The question for the jury to determine is, who are the true and real owners of said waters, and entitled to their use and enjoyment. Given.

101 4. The legal title may be in one party, while the equitable title may be in a different party. Given.

5. The jury are the exclusive judges of the evidence, and of the weight to give to each witness, and they may take into consideration the interest that any witness may have in the result of the controversy, or his interest in the property in dispute, his appearance on the witness stand, and under all of the circumstances the probability of the truth or falsity of his statements. Given.

6. If the jury are satisfied from the evidence that the property in controversy is the property of the Hellgate and Avalanche Ditch Company, then the verdict should be for the defendants. Given.

7.

8. Proof by oral admissions or declarations should always be received with great caution, and should be viewed in the light of all the circumstances surrounding the transaction concerning which

they were made. Such evidence consists in the mere repeti-
102 tion of oral statements, and is subject to much imperfection and mistake, the party making them either not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens that the witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party actually did say. By the court:

But where the declaration or admission is deliberately made and precisely identified the evidence it affords is often of the most satisfactory nature. Given.

9. If the jury should believe that the members of the Hellgate and Avalanche Ditch Company did usually speak of the thirty-five inches of water decreed in the case of Gallagher *vs.* Basey to Stafford as Stafford's water, such declaration might be consistent with the fact that the actual ownership of the water was in the company and not in Stafford individually. Given.

10. If the jury believe, from the evidence or admissions in
103 the pleadings, that the suit of Gallagher *against* Basey *et al.* was defended by and the expense borne by the Hellgate and Avalanche Ditch Company, of which the plaintiff was a member, and that the plaintiff, as president of the company, or by instructions from the company, took on himself the principal management of the defense in the case; and that he procured the decree to be drawn in his own individual name for the 35 inches of water, and that by any previous arrangement between him and the members of the company the company were jointly interested with him in the water known as the White and Tower water, such decree would inure to the benefit of the company, and Stafford, in such case, would be a mere trustee; and any subsequent declarations of other members of the company would not and could not affect the joint ownership by the entire company of the water, unless by some subsequent arrangement based upon a valid consideration they transferred such interest to the plaintiff. Given.

11. If the jury believe, from the evidence, that the Hell-
104 gate and Avalanche Ditch Company took possession of the water decreed in favor of Stafford by the decree in the Gallagher and Basey case, in the year A. D. 1871, and that ever since that time they claimed the same as the property of the company, and held possession thereof adversely as against any individual claim of Stafford, and except when, by an agreement with him, they permitted him at times to use the water on a ranche owned by the company and rented to them by Stafford, they will find for the defendants. Given.

12. The burden of proof in this case is upon the plaintiff. It is conceded that if the 35 inches of water belonged, at the time of the rendition of the decree introduced in evidence, to the Hellgate and Avalanche Ditch Company, that the defendants are now the owners of said water. In determining that important question, you are to consider all of the evidence permitted to go before you, oral as well as documentary. The conduct and management of the mem-

bers composing said company previous to the rendition of the decree at the time the same was rendered and subsequent thereto,
105 the use and enjoyment of the water since the rendition of said decree, the declarations of the members of the company in relation thereto, the mode and manner in which the same has been used, and as to whether the use and enjoyment of said 35 inches has been controlled by the Hellgate and Avalanche Ditch Company, or controlled by the direction of the plaintiff individually and independently of the company; and if, under the evidence, you are satisfied that said water at the time of the rendition of said decree was the property of the Hellgate and Avalanche Ditch Company, and that the use and enjoyment of any of the waters subsequent to the rendition of said decree of Avalanche gulch has been by the plaintiff in subordination to the rights of said Hellgate and Avalanche Ditch Company, then your verdict should be for the defendants. Given.

The court struck out from the 8th instruction the words, "And such evidence is at most weak evidence, and not entitled to the same weight as where a witness is testifying to facts of which he has personal knowledge," and added thereto as follows: "But
106 where the declaration or admission is deliberately made and precicely identified, the evidence it affords is often of the most satisfactory nature." To which change and modification the defendants at the time duly excepted.

The court struck out from the ninth instruction the words "are perfectly and completely reconcilable," and in lieu thereof inserted the words "might be consistent."

To which change and modification the defendants duly excepted.

D. S. WADE, *Judge.*

Assignment of Errors.

Errors in Law.

1. The court erred in permitting the evidence of Stafford as to the daily value of the user of the water.

2. The court erred in excluding the complaint and answer from being introduced in evidence in the case of Gallagher *et al vs.* Basey *et al.* after the plaintiff had introduced the decree rendered in said cause.

107 3. The court erred in refusing to allow defendants to prove what took place between plaintiff and the defendants at the time the deeds dated 30th of March, A. D. 1878, were executed.

4. The court erred in permitting the testimony of the witnesses, Rotwitt, Blackwell, and Toombs, to be introduced as evidence, concerning the declarations of members of the Hellgate and Avalanche Ditch Company in reference to the 35 inches of water or the right called the White & Tower right; the same being incompetent as rebuttal, and no foundation having been laid to justify its introduction; and that it was when so introduced incompetent for any purpose, and was improperly admitted.

5. The court erred in refusing to allow the defendants to read in

evidence the deeds from Fischer and Hendrickson to S. Clem, I. Clem, W. O. Warner, O. C. Warner, and H. Clapper, dated July 26, A. D. 1869, for $\frac{5}{12}$ of the Magpie water right.

108 6. The court erred in giving each one of the several instructions asked for by plaintiff.

7. The court erred in modifying the defendant's eighth instruction.

8. The court erred in modifying the defendant's 9th instruction.

9. The court errred in permitting the plaintiff to introduce in evidence the decree in the case of Gallagher *et al. vs.* Basey *et al.* without requiring the pleadings in said case to be first introduced in evidence, so as to define the issues in said action.

10. The court erred in allowing the plaintiff to introduce said decree in evidence, and to prove user of the water in question, and after having rested his case and defendandants had introduced their evidence and rested their case, in allowing the plaintiff to re-open his case in chief, and introduce evidence not in rebuttal, but in support of what he had introduced in making out his case in the first instance.

109 11. The court erred in permitting the plaintiff to introduce in evidence the pleadings in the case of Gallagher *et al. vs.* Basey *et al.*, above mentioned, and striking the same out of the evidence upon its own motion.

CHUMASERO & CHADWICK &
SHOBER & LOWRY,
Defendants' Attorney.

Amendments to Statement.

In the District Court of the Third Judicial District, Lewis & Clarke County, Montana Territory.

JOSEPH V. STAFFORD, Plaintiff,
vs.
JAMES HORNBUCKLE and SAMUEL MARSHALL, Defendants.

Strike out "White's gulch" whereever it occurs and insert "White & Tower water ditch." Allowed.

Add to evidence of Niehorn, on page —, line —, after word "4," as follows, to wit: "I have often heard Loomis and the Warners talk about Stafford's right to the 35 inches of water known as the White and Tower right." Allowed.

110 Add to evidence of J. V. Stafford, after the word "suit," on page —, line —: "I never in any way disposed of it (the 35 inches of water) to the company or any one else; the deeds made by me to defendants and from defendants to me, show what was sold to them. These are the deeds. These are the accounts and receipts taken by the Hellgate Ditch Company before they contemplated taking the ditch on to Avalanche. The company never contemplated taking my 35 inches of water, and I had never any agreement with them by which they were to do so." Allowed.

Insert after the word "rested," on line —, page —: "Here the court announced to said defendants' attorneys that they were at liberty to introduce any evidence or testimony of witnesses in rebuttal or contradictory of any evidence theretofore given by the plaintiff, as if such evidence had been given and introduced by him in chief, in making out his case in the first instance." Allowed.

Insert all deeds and exhibits introduced and received in said cause. Allowed.

SANDERS & CULLEN,
111 E. W. TOOLE,
Att'ys for Plaintiff.

The foregoing statement with the amendments is as allowed and annexed thereto correct.

D. S. WADE, *Judge.*

And on the 26th day of April, A. D. 1878, the said cause came on to be heard before the court and a jury duly empaneled and sworn to try the same, and was argued by counsel, and submitted with instructions.

And on the same day, to wit, on the 26th day of April, A. D. 1878, the said jury returned into court, and presented the following special findings in said cause: to wit:

Special Issues.

Title of Cause.

First. The 35 inches of water being decreed to plaintiff Stafford by decree dated July, 1871, did he hold the same for himself and as his own property or in trust for himself and the other members of the Avalanche Ditch Company?

112 For himself.

J. H. WELSHER, *Foreman.*

Second. If the plaintiff owned said water in his own right, did he ever part with his right to said water?

He did not.

J. H. WELSHER, *Foreman.*

Third. Were said 35 inches of water contributed and transferred by plaintiff to the Hellgate and Avalanche Ditch Company prior to the decree in the action of Gallagher and others *vs.* Basey & others?

It was not

J. H. WELSHER, *Foreman.*

Fourth. After the rendition of such decree, did said 35 inches of water belong to said Hellgate & Avalanche Ditch Company?

It did not.

J. H. WELSHER, *Foreman.*

Fifth. Did the said ditch company use the said 35 inches of water adversely to the plaintiff; and if so, from what date, and for what length of time?

They did from April 1, 1878, up to April 26, 1878, (26 days.)

J. H. WELSHER, *Foreman.*

Sixth. Did the plaintiff use the said 35 inches of water adversely to the ditch company, and if so, from what date, and for what length of time?

113 He did not.

J. H. WELSHER, *Foreman.*

And also returned the following general verdict:

General Verdict.

JOSEPH V. STAFFORD, Plaintiff,
vs.
JAMES HORNBUCKLE *et al.*, Defendants.

"We, the jury, find for the plaintiff, and assess his damages at one dollar.

"J. H. WELSHER, *Foreman.*"

Thereupon on the 6th day of May, A. D. 1878, the said defendants filed in said cause their notice of intention to move for a new trial herein, of which the following is a copy, viz:

Title of Cause.

To E. W. TOOLE, Esq., *Att'y for Plaintiff:*

Take notice that the above-named defendants, on the 21st day of October, A. D. 1878, at the court room, in the town of Diamond City, county of Meagher aforesaid, and at the hour of 10 o'clock a. m. on that day, or as soon thereafter as counsel can be heard, will move the above-named court for a new trial in *in* this cause.

114 Said motion will be made and based upon the following grounds and assignment of errors, to wit:

First. Irregularity in the proceedings of the court by which the defendants were prevented from having a fair trial in this, to wit:

a. The court permitted the plaintiff to introduce in evidence a decree of the said court in a former action commenced by John Gallagher and others against the said plaintiff and others, and without requiring the pleadings in such action to be first produced and introduced in evidence, so as to define the issues in such action.

b. In allowing the plaintiff to introduce said decree in evidence and to prove user of the water in question in this action, and after having rested his case, and the defendants having introduced their proof and rested their case, in allowing the plaintiff to reopen his case-in-chief and introduce evidence not in rebuttal, but in support of what he had introduced in making out his case in the first instance. (See bill of exceptions.)

c. After permitting the defendants to introduce in evidence the pleadings in the case of Gallagher and others *vs.* Basey,
115 Stafford, and others, above mentioned, in striking the same out of the evidence upon its own motion.

Second. Insufficiency of the evidence to justify the verdict, and that the verdict is against the evidence properly before the court, and is against law.

Third. Errors in law occurring at the trial and excepted to by the defendants, to wit:

a. The court erred in allowing the decree above named to be introduced in evidence without the pleadings.

b. The court erred in allowing the plaintiff to prove the value of the water in controversy per day.

c. The court erred in striking from the evidence introduced by the defendants the complaint and answer above mentioned in the case of Gallagher *et al. vs.* Basey, Stafford, *et al.*

d. The court erred in excluding the evidence offered relative to what was said, if anything, at the time of the execution of the two deeds introduced in evidence—one from Stafford, the plaintiff, to the defendants, and one from the defendants to the plaintiff—and in refusing the witness, Hornbuckle, to answer the questions propounded to him, as set forth in the bill of exceptions.

116 *e.* The court erred in excluding the evidence of the said witness, which was offered to establish the fact that at the time of the execution of the said deeds nothing was said by plaintiff about his individual right to any of the waters of Avalanche gulch.

f. The court erred in allowing the witness, Rotwitt, to answer the questions propounded to him; that the evidence was incompetent for any purpose; that it was not in rebuttal, and could only have been introduced, it at all, in the first instance, in making out the plaintiff's case.

g. And for some reasons the court erred in permitting the plaintiff to examine the witnesses, Joel Frick, H. H. Conable, Joseph Blackwell, Jos. Hiehorn, and John Toombs.

h. The court erred in excluding the deed offered in evidence, executed by Jacob Fischer & others to O. C. Warner & others, bearing date July 26, 1869, for $\frac{5}{12}$ of certain waters in Magpie gulch.

i. The court erred in giving each and every instruction that was asked by plaintiff.

j. That the court erred in refusing to give the 7th instruction asked by the defendants.

k. That the court erred in modifying, and not giving as
117 asked, the 3, 4, 8, 9, 12, & 13th instructions prayed for by defendants.

CHUMASERO & CHADWICK,
SHOBER & LOWRY,
Defendants' Attorneys.

TERRITORY OF MONTANA,
County of Lewis & Clarke, } *ss:*

W. F. Chadwick, being first duly sworn, deposes and says that

he is one of the attorneys for the defendants in the within-named action; that affiant served a copy of the within notice of intention to move for a new trial in the said action, by leaving the same in the office of E. W. Toole, at the hour of 2 o'clock p. m. of the 6th day of May, A. D. 1878; that at the time of said service there was no person in the said office.

W. F. CHADWICK.

Subscribed and sworn to before me this 6th day of May, A. D. 1878.

A. H. BEATTIE, *Clerk.*

And on the 15th day of May, A. D. 1878, the said defendants in pursuance of said notice of motion, filed herein their motion for a new trial in said cause, of which the following is a copy, to wit:

118 *Title of Cause.*

To E. W. TOOLE, Esq., *Attorney for the above-named Plaintiff:*

You will take notice that the above-named defendants, on the 21st day of October, A. D. 1878, at the hour of 10 o'clock of that day, or as soon thereafter as counsel can be heard, at the court room, in the town of Diamond City, county of Meagher, Territory of Montana, will move the court for a new trial in the above-entitled action. That the said motion will be made upon the statement this day filed with the clerk of the said court, and upon the assignment of errors therein contained, and upon the grounds and upon the errors specified in the notice of motion for a new trial given and filed upon the 6th day of May instant.

Dated May —, 1878.

CHUMASERO & CHADWICK,
SHOBER & LOWRY,
Defendant's Attorneys.

A copy of the within motion received this 15th day of May, A. D. 1878.

E. W. TOOLE,
Plaintiff's Attorneys.

119 And on the 21st day of October, A. D. 1878, the following stipulation was filed herein, viz.:

Stipulation.

In the District Court of the Third Judicial District, County of Meagher, Montana Territory.

JOSEPH V. STAFFORD, Plaintiff,
vs.
JAMES HORNBUCKLE *et al.*, Defendants.

It is hereby stipulated that the motion for a new trial in the above-entitled cause be, and the same is hereby, transferred to the

county of Lewis and Clarke, for the purposes of having the same determined at the November term of the District Court for said county; that the judge thereof at his earliest convenience settle the statement therein for the purposes aforesaid, and that the same, when so settled, be filed with the clerk of said court, and if not sustained, then said cause be again transferred by an order of said court duly made at the term at which the said ruling is made to said court in which the said motion is now pending; and if not
120 sustained, then an appeal may be taken directly from said ruling as if made in said court in said county of Meagher.

SANDERS & CULLEN AND
E. W. TOOLE,
Att'ys for Plaintiff.
CHUMASERO & CHADWICK,
Att'ys for Defendants.

And the said motion for a new trial coming on to be heard before the court, the same was by the court overruled; to which ruling the defendants at the time duly excepted.

Thereupon judgment and decree was duly rendered herein as follows, to wit:

Judgment and Decree.

Title and Cause.

Be it remembered that on this 28th day of April, A. D. 1878, being one of the days of the April term of said court, this cause coming on to be heard, and having been submitted to a jury upon the issues therein joined, and the said jury having returned into court their general and special verdict in favor of the said plaintiff, which were duly approved and adopted by the
121 court; and it appearing therefrom, as well as from the pleadings, evidence, and proceedings had in said cause that said plaintiff was at the time of the commencement of this action, and now is, the owner of a certain water ditch known as the White and Tower ditch, also a certain other water ditch known as the Basey ditch, both of which intersect and tap Avalanche gulch and the waters thereof, situate in the county of Meagher and Territory of Montana, and more particularly described in the pleadings herein; and it also appearing, as aforesaid, that said defendants have, before the commencement of this action, and still continue to divert the waters of said gulch away and from the said ditches of plaintiff, in violation of his said rights and to his great and irreparable injury and damage; and whereas it also appears, as aforesaid, that said plaintiff was, and is, entitled to have thirty-five inches, miner's measurement, of the waters of said Avalanche gulch flow down and into and through said White & Tower ditch, or such an amount as would be necessary and requisite at the head of said Basey ditch to make said thirty-five inches at the head of said White &
122 Tower ditch; and whereas it appears, as aforesaid, that one hundred and twenty-five inches, miner's measurement, is neces-

sary and requisite at the head of said Basey ditch to make said thirty-five inches of water at the head of said White & Tower ditch, and that said plaintiff was, and is, entitled to have said thirty-five inches of water flow in and to said White & Tower ditch, or said one hundred and twenty-five inches thereof, at his option, flow in and to said Basey ditch (miner's measurement) without let or hinderance from said defendants, or either or any of them, whenever said gulch affords said amounts of water, and when sufficient, then such an amount as the same affords or supplies; and it also appearing to the satisfaction of the court, in the proper exercise of its functions in this behalf. that said plaintiff is entitled to a decree and perpetual injunction herein, in accordance with the foregoing recitals: It is, therefore, adjudged and decreed that the said plaintiff is entitled to the possession, use, and enjoyment of thirty five inches, miner's measurement, of the waters of said Avalanche gulch, to flow in and to the head of said White and Tower ditch, or one hundred and twenty-five inches like measurement of the waters of said
123 gulch flow in and to said Basey ditch at the head thereof without let or hinderance from said defendants, or any or either of them. And it it is hereby adjudged and decreed that said plaintiff do have, hold, possess, and enjoy the same; and that said defendants, their agents, attorneys, hands, and employés, and all and every person acting through, under, or in privity with them, or either of them, be, and they are hereby, forever and perpetually enjoined and restrained from further diverting or interfering with the free and unobstructed flow of the waters aforesaid to the extent aforesaid in and to the said ditches of plaintiff as provided in the foregoing decree. It is also considered that the said plaintiff do have and recover of said defendants the sum of one dollar damages, together with the sum of two hundred and thirty-one $\frac{00}{100}$ dollars, costs taxed herein, and that he have execution therefor.

Witness my hand and seal the day and year aforesaid.

D. S. WADE, *Judge.*

And on the 21st day of December, A. D. 1878, the said defendants filed herein their notice of appeal as follows, to wit:

124 *Notice of Appeal.*

In the District Court, Third Judicial District, Meagher County, Montana Territory.

JOSEPH V. STAFFORD, Plaintiff,
vs.
JAMES HORNBUCKLE and SAMUEL MARSHALL, Defendants.

You will please take notice that the defendants in the above-entitled action hereby appeal to the supreme court of this Territory from the judgment and decree therein made and entered in the said district court, on the 26th day of April, A. D. 1878, in favor of the plaintiff in said action and against said defendants, and from the

whole thereof, and from the order of the court in overruling defendants motion for a new trial.

Dated this 21 day of December, A. D. 1878.

Yours, &c., CHUMASERO & CHADWICK & JOHN H. SHOBER,
Atty's for Defendants.

To the clerk of said district court and E. W. Toole & Sanders & Cullen, attorneys for the plaintiff.

125 Due service and receipt of a copy of the above notice of appeal hereby admitted after filing, this 27th day of December, A. D. 1878.

E. W. TOOLE, *Att'y for Plaintiff.*

And afterwards, on the same day, to wit, the 21st day of December, A. D. 1878, the said defendants filed herein their undertaking on appeal, as follows, viz:

Undertaking on Appeal.

In the District Court, Third Judicial District, Meagher County, Montana Territory.

JOSEPH V. STAFFORD, Plaintiff,
vs.
JAMES HORNBUCKLE and SAMUEL MARSHALL, Defendants.

Whereas the defendants in the above-entitled cause are about to appeal to the supreme court of the Territory of Montana from a judgment and decree entered against them in said action in the said district court in favor of the plaintiff in said action, on the 26th day of April, A. D. 1878, for certain waters described in
126 the complaint in said cause, and two hundred and thirty-one $\frac{50}{100}$ dollars costs of suit.

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned do hereby jointly and severally undertake and promise, on the part of the appellants, that the said appellants will prosecute their appeal with effect, and will pay all damages and costs which may be awarded against them on the trial of the appeal, or on a dismissal thereof, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

Dated this 21st day of December, A. D. 1878.

J. D. CONRAD. [SEAL.]
JAMES HORNBUCKLE. [SEAL.]
COURT SHERIFF. [SEAL.]
SAMUEL MARSHALL. [SEAL.]

TERRITORY OF MONTANA, } ss:
County of Meagher. }

Court Sheriff and J. D. Conrad, the persons named in, and who

subscribed the foregoing undertaking as the sureties thereto, being severally duly sworn, each for himself says: that he is a resident and householder within the Territory of Montana, and is
127 worth the amount specified in said undertaking as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt by law from execution.

COURT SHERIFF,
J. D. CONRAD.

Subscribed and sworn to before me, this twenty-first day of December, A. D. 1878.

[SEAL.] L. ROTWITT,
Notary Public.

JOSEPH V. STAFFORD, Plaintiff,
vs.
JAMES HORNBUCKLE *et al.*, Defendants.

I, A. H. Beattie, clerk of said court, do hereby certify that the foregoing 127 pages, numbered from 1 to 127, inclusive, contain a full, true, and correct transcript of certain pleadings, records, and proceedings filed, made, and had in said district court in said cause.

Witness my hand and the seal of said district court hereunto affixed, this 1st day of January, A. D. 1879.

[SEAL.] ALEX. H. BEATTIE, *Clerk.*

Proceedings on Appeal.

128 In the Supreme Court of Montana Territory. January Term, A. D. 1879.

JOSEPH V. STAFFORD, Respondent,
vs.
JAMES HORNBUCKLE and SAMUEL MARSHALL, Appellants. } No. 293.

Be it remembered, that in the present term of January, in the year of our Lord one thousand eight hundred and seventy-nine, the above-entitled cause was brought into the supreme court of Montana Territory by virtue of an appeal taken in conformity to the statutes of said Territory regulating appeals to said court, and the transcript of the record of the district court in said cause was filed and the cause docketed pursuant to the rules of said supreme court, and the hearing herein was, by agreement of parties, continued to the August term, A. D. 1879, of said supreme court.

And on the 11th day of August, A. D. 1879, the said appellants filed herein their brief, as follows, to wit:

129 In the Supreme Court of Montana Territory. August Term, 1879.

JOSEPH V. STAFFORD, Respondent,
vs.
JOSEPH HORNBUCKLE *et al.*, Appellants.

The points relied on by appellants for a reversal of the judgment herein are—

1. The judgment and decree in said cause is for 125 inches of the waters of Avalanche gulch as against the defendants, when, in truth and in fact, the respondent only claims 35 inches by virtue of the decree in the case of Gallagher *et al. vs.* Basey *et al.*, and that is the only claim of plaintiff as against defendants to any of the waters of said Avalanche gulch. He can claim no greater right than said decree gives him; that is, only 35 inches at the point where the ditch of Gallagher and others taps the waters of said Avalanche gulch, or at any point above. See copy of said decree, record, pp. — to —, inclusive.

If plaintiff was entitled to any water by virtue of said decree, that amount would be but 35 inches at the head of the ditch
130 designated in said decree, or at any point above the head of said ditch. See copy of decree.

Any other construction would render said decree void for uncertainty.

2. The court erred in excluding from the consideration of the jury the amended complaint and answer introduced in evidence in this case (being the pleadings in the case of Gallagher *et al. vs.* Basey *et al.*,) and being the case in which the decree under which plaintiff claims title was rendered. The plaintiff in this case and one of the defendants in the said case demanded no affirmative relief in said cause, and was not entitled to any. The decree rendered in said cause, so far as the 35 inches of water decreed to Stafford is concerned, was outside of any issue tendered by the pleadings in said cause. A court will not, in a decree, declare any fact which is not put in issue by the pleadings.

2 Ind., page 113, Buffalo *vs.* Buffalo.
1 B. Monroe, 266, Shelly *vs.* Shelly.
7 Wheaton, 522, Crockett *vs.* Territory.
10 Wheaton, 181, Corneal *vs.* Banks.
4 Bibb, 376, Huntley *vs.* Young.
131 Stewart *vs.* Farmers' and Mechanics' Bank, 19 John., 505.
Morgan's executors *vs.* Crab, 3 Porter, 470.

There was no separate claim by Stafford in said action. The answer was by the members of the "Avalanche Ditch Company," of which Stafford was a member, and was by him verified. See record, pages — to —.

Wharton on Evidence, sec. 838, page 838.
" " " 836, " 836, 837.
" 1110 *et seq.*, 1110 *et seq.*
1 Allen, Cumier *vs.* Sulloway, 19.
2 " Gordon *vs.* Bonnell, 212.
12 " Bliss *vs.* Nichols, 443.
120 Mass., Brown *vs.* Jewell, 217.
44 N. Y., Cook *vs.* Barr, 156.

3. The court erred in refusing to permit the following question to be answered by witness, Hornbuckle, to wit:

"What, if anything, was said at the time by Stafford as to any individual claim by Stafford to rights in Avalanche gulch?"

It was proper to show what was said and done by Stafford
132 with regard to the interest conveyed to defendants, and at the time of executing the conveyance. (Record, page —.)
Kinna & Ming *vs.* Woodfolk, decided January T., 1879.

If the water of Avalanche ditch embraced all of the waters at that time flowing in Avalanche gulch above, it would have been a circumstance to go to the jury, and tend to show that Stafford did not then claim the same as his individual right.

4. We claim it was error to permit plaintiff to call L. Rotwitt, Toombs, and others, witnesses, and have them testify to declarations made by the predecessors in interest of defendants while they were members of the Avalanche Ditch Company. It was not in rebuttal of any evidence introduced by defendants. It was incompetent evidence. See record, pages — to —, inclusive.
Bouvier's Law Dictionary, Rebutting Ev., p. 412.

We claim that the question asked Joel Flick and other witnesses, as follows, was improper, to wit:

"Did you have any talk among the members of the Avalanche Ditch Company as to the contract or agreement by which the plaintiff became a member of it?"

133 We also claim the answer incompetent and calculated to mislead the jury. See record, pages — to —.

It was not in rebuttal to any evidence offered by the defendants, and was calculated to convey the impression that plaintiff had procured his interest in the Avalanche Ditch Company by an exchange of the Magpie ditch property.

5. It was error to refuse the admission of the deed offered in evidence from Hendrickson and Fischer to the Warners and others. It was a circumstance to show the mode and manner of the acquisition of the respective interests of the several members of the Avalanche Ditch Company, and in what manner held.

The second instruction, given at the instance of the plaintiff, we claim made it incumbent upon the defendant to show that plaintiff parted with the 35 inches of water. In this particular we think said instruction erroneous. We claim that any evidence in the case, whether on the part of the plaintiff or the defendants, that tended to establish the fact that the 35 inches of water in
134 controversy was the property of the Avalanche Ditch Company, was for the consideration of the jury. Record, page —.

Also that portion of instruction No. 4 after the word "company," 5th line, page 76, down to and including the word company on same page, 7th line. Also the following language in instruction No. 5, record, page 77, to wit: "That is to say, if it is admitted in the pleadings." From word "mode," in line —, page —, to and including the word "pleadings," line —, page —. As to what was admitted in the pleadings was for the construction of the court, and was not within the province of the jury.

We claim it was error in the court to make the modification to defendant's instructions embraced in exceptions. Page of record, 83.

The evidence shows that the Avalanche Ditch Company commenced the use of all the waters of Avalanche gulch in A. D. 1871, and controlled and used it continuously until April, A. D. 1878.

Special finding No. 6 shows that plaintiff never used said water adverse to the Avalanche Ditch Company.

135 The court erred in permitting witness Stafford, under objection of defendant, to testify as to the value of the water per day claimed by the plaintiff. See record, pages — to —.

The verdict and special findings, aside from the 6th special finding, is clearly against the weight of the evidence.

All of the originial members of the Avalanche Ditch Company (except the plaintiff) testify positively as to the waters claimed by plaintiff being part and portion of the company property.

In answer to special issue No. 6 the jury find that plantiff never used it adversely to the Ditch Company. The only evidence outside of plaintiff's own testimony was as to declarations of Warner and Loomis, which is at best weak and unsatisfactory evidence.

All of the evidence is in the record.

CHUMASERO & CHADWICK,
SHOBER & LOWRY,
Appellants' Attorneys.

And on the 12th day of January, 1880, the respondent filed herein his written argument and brief as follows, to wit:

136 *Respondent's Answer to Points and Authorities Submitted by Appellants.*

In the Supreme Court of Montana Territory. January Term, A. D. 1880.

JOSEPH V. STAFFORD, Respondent,
vs.
JAMES HORNBUCKLE *et al.*, Appellants.

1. It will be seen from the pleadings in this case that appellants in so far as the decree in the case of Gallagher *et al. vs.* Basey *et al.* is concerned, admit its rendition and do not question its validity. They admit that an amount of water sufficient to make thirty-five inches at the head of the White & Tower ditch, in Avalanche gulch, was adjudged to said respondent by the terms of said decree. They admit all the allegations in reference to the decree as they are set out in the complaint, save the denial to cover the clerical error in the title of the case, Gallagher being named John, instead of Joseph. Besides it will be found that the denials of respondent's title are modified and interpreted by the affirmative matter

137 set up in the answer; *i. e.*, that appellant once owned the water, but that he had parted with his title to it, and that the decree to it was taken in his name, as trustee, simply for his coowners. The court would, if requested, have instructed the jury that appellants title to this 35 inches of water or its equivalent was admitted by the pleadings, and that no evidence was necessary to

establish that he was once such owner; and that the only issue upon that point was whether he had been divested of it. The introduction of the decree therefore could do no injury. It was simply introducing useless testimony, however weak or strong it may have been. Besides the amount of water that appellant was entitled to individually, if prior to the claim of the contending parties in the case of Gallagher *et al. vs.* Basey *et al.*, was a very material matter to ascertain, that a proper decree could be rendered in that case. It is just the condition of affairs contemplated by our statutes by section 3, page 40—all those interested in that suit and this one are parties or privies. The order of the court submitting such issue is not brought up to show error in the mode of submitting it,
138 if there was any such error. Appellants predecessors in interest were parties, accepted the order submitting the issue as well as the decree, and they both stand unreversed and in full force. The decree as a portion of the evidence offered by respondent should, like a defective conveyance or any other defective muniment of title, have been objected to at the very time it was offered, and the particular grounds of objection pointed out and an exception to its admission taken. It cannot be admitted in evidence without such objections and exceptions, and afterwards make an assignment of it as error (even if it was such) available on appeal. It was not the province of the jury to construe the decree from the pleadings. If appellants had asked the court to construe it at the time or pass upon its validity, respondent would have been able to produce the necessary order for the submission under the statute, perhaps, and removed the objection to it, if any there was. But we say respondent's title is admitted by the pleadings, and the only question really at issue was, did he part with it? was admitted, and it cut no figure as to the divestiture of any title. The decree could in no event show a better title there.

139 2. We say as to the second point: 1st, that if there was no order or issues submitted upon which the decree was based, the objection should have been made at the time it was offered in evidence, the grounds of such objection stated and exception taken; and 2nd, that it wat an issue properly made. The questions tendered by the complainant in the case of Gallagher *et al. vs.* Basey *et al.*, involved the priority of right as between those respective companies, and it was absolutely necessary to ascertain what, if any, prior right that existed, so as to make the decree accordingly. It was certainly good evidence that in that suit, appellants being privies, that respondent's rights were, at least, reserved and excepted out of the decree. The issues show that the defendants in that case had diverted the water at a point above Gallagher's ditch, which was the Avalanche Ditch Company, and in so far as the verified answer of the defendants made by respondent is concerned, the court would exclude it as well as the other pleadings, as throwing no light upon the title to the waters in question at the head
140 of the White & Tower ditch. If a diversion at that point had been averred, and respondent had verified, or even put in

an answer for his company, claiming this water, then, as an admission, the pleadings might have been permitted to go to the jury.

3. As to the 3rd point made by appellants, it was offered, if for any purpose, to establish an estoppel *in pais*, by his failure to make known his title to the White & Tower water of Avalanche gulch. It was inadmissible: 1st, because it was not pleaded; 2nd, because the deed mentioned does not purport to convey any individual water right of respondent. See record, pages —. 3rd, because respondent's individual rights to this water were expressly reserved by the terms of the deed, and in the absence of an allegation of fraud in its execution, as well as proof thereof, oral evidence, or silence of respondent when the deed speaks for itself, was inadmissible. The cases cited have no application here.

4. As to the 4th point presented, the evidence was competent and proper, and there was no error in its admission at the time it was admitted.

141 1. Because the court can, in its discretion, regulate the order of proof and without a request and refusal by the court to allow defendants or appellants to treat it as original evidence on the part of the plaintiff, and introduce testimony to contradict it, certainly no error is shown.

2nd. Because, from the particular issues presented in the case, and the testimony of the defendants tending to show that plaintiff had divested himself of his title (not by writing) but by an oral agreement with the predecessors in interest of appellants, it was eminently proper to allow the plaintiff to show that such predecessors had made different statements than those testified to by them. In the first instance plaintiff shows his title and possession at a certain time; then defendants seek to show that he had parted with it. This evidence must be met somewhere, and at the time the court permitted respondent to rebut it was the only opportunity offered. But it is contended that this evidence was incompetent for any purpose. We admit, as a general rule, the evidence of a predecessor's declarations in disparagement of his title are

142 inadmissible. In the case at bar, however, the only evidence that respondent ever parted with his individual title to this water was the oral evidence of those predecessors, and it was certainly competent to show, by like evidence, that they had made statements to the contrary, and always recognized the rights of respondents to the water in question. So as to the testimony with reference to the value of the water. No continuing damages were found, at least no judgment was rendered for any, and defendant was not injured, but the evidence was competent. If the court has the right to regulate the order of proof, the amendment to the statement, as found on page —— of the record, sets every question at rest.

5. The case went fairly to the jury under the pleadings, evidence, and instructions, and the general & special verdict and decree are just and should not be disturbed. We have not considered the points, in our view of the case, such as require the citation of authorities, and we most respectfully submit that all of those presented

by appellants are wholly inapplicable, when considered in
143 connection with the true state of the record of this case.

6. As to the question presented by appellants, that respondent is limited in amount, at the head of his, "Basey Ditch," to the 35 inches to which he was entitled at the head of his White & Tower Ditch, we submit: 1st. That his decree fully establishes his right to 35 inches at the head of said White & Tower ditch, or what was necessary in the creek above it to make that amount at that point, and that appellants grantors were required to turn down a sufficient amount of said water to make that amount at that point. 2nd. That aside from the decree, it is admitted that by the findings, respondent's right to thirty-five inches of water at the head of the White & Tower ditch was never given or sold to appellants, and that they never acquired a right to it by adverse possession and user. It is conceded by the record that it requires 125 inches of water to pass the head of appellant's ditch to make 35 inches at the head of the White & Tower ditch, and there is no conflict in the evidence on this point to raise any uncertainty. This being the case, that respondent's right to the thirty-five inches of water at the
144 point designated was an appropriation alike of a sufficient amount of the water above to make up that quantity. That by taking his water out above, he can make it more available and not injure appellants, and he has the right to do so. Appellants' appropriation was in point of fact only the excess over the 125 inches which he is required on account of the prior right of respondent to let pass by the head of their ditch; so long as he is required to permit no more to escape, his rights are not impaired. It would seem clearly the right of the first appropriator to puddle the bed of the stream, or in any other available manner stop the sinking of this ninety inches of water, it not being appropriated by appellants or their grantors, and thereby make it available. There certainly can be no objection to his taking the most expeditious and economical mode of accomplishing the same purpose as in this case, the purchase and use of the "Basey ditch." As to the decree in the case of Gallagher *et al. vs.* Basey *et al.*, admitted in evidence and to which it is claimed that such objections were made and exceptions taken as entitle appellants to a hearing upon the propriety of its admission,
145 we respectfully submit the following: The parties to this suit, such as are not original parties in the case of Gallagher *vs.* Basey, are successors in interest since the rendition of the decree in that case, as will be seen bp the record, and are consequently privies and bound by it. If, then, the decree in the case of Gallagher *vs.* Basey binds the parties in that suit in respect to the individual right of Stafford, the parties herein are alike bound. The court was one of original jurisdiction and superior, and not one of limited or inferior functions. Its decrees import absolute verity, unless it is shown that the quality of jurisdiction is wanting. The court had jurisdiction of the persons of the parties to the action, but it is contended that it had no jurisdiction to pass upon the question, for the reason that the issues in reference to this water were not presented by the pleadings. How this can be said is hard to see; but, supposing it

to be true, the court, for the purposes of upholding the judgment, will assume, if there was any other lawful mode by which such issue could be submitted, that it was pursued by the court. Our statute in force at the time, (see Codified Statutes, pages 28,
146 sec. 3; 10th-session Laws, page 40, sec. 3,) provides that "when a question of fact not put in issue by the pleadings is to be tried by a jury, an order for the trial may be made, stating distinctly and plainly the question of fact to be tried; and such order shall be the only authority necessary for a trial."

Now, two things are conclusively presumed in order to uphold this decree, unless the record unequivocally shows to the contrary: 1st. That the issue of fact upon which the decree was based was one necessary to the complete determination of the rights of the parties and was so considered by the court; and, 2d. That the proper order for the submission, as well as the specification of the issues to be submitted, were duly made. Now, there is nothing in the record showing that this was not all regularly done, while the decree itself, among other things, purports to be based upon the proceedings had in the case. See Drake *vs.* Duveneck, 45 Cal., 461, *et seq.*

Many decisions might be cited to show that unless the contrary appears expressly by the record, every conceivable thing necessary to uphold judgments and decrees of courts of superior juris-
147 diction will be indulged in by the court, but the doctrine is too elementary and well established to require such a course to be pursued here. Suppose the state of facts existed which is true in the case of Gallagher *et al. vs.* Basey *et al.*, in which the decree referred to was rendered? The plaintiff in that case seeks to enjoin the defendants from diverting certain waters of Avalanche gulch, through a certain ditch then owned by them, known as the Hellgate and Avalanche ditch, and ask a decree of title between the parties in respect to the water to which the ditches then in question were respectively entitled. To these allegations & issues defendants respond. It is absurd that an older right than either of those to a part of the water in controversy is in existence, *i. e.*, the rights of this plaintiff in the White & Tower ditch. The court at once sees that in order therefore to adjust the rights of the parties and make a proper decree, that this prior title must be taken into account. All the respective parties in interest are before the court. The water of the creek is subject matter of the controversy, and it directs the trial under the statute of this prior right that the
148 decree may be made certain and effectual, and the real rights and equities of the parties finally and fully determined. This is what the decree purports to do and what it does.

See sec. 3, page 28 and C. *Supra*, (Cod. Sts.,) and 15th Cal. 263.

But it will be found from the record that no issue is taken in the pleadings as to the validity of this decree. All the parties in this action as to the water here in question claim under Stafford's title by reason of the White & Tower ditch. This decree could establish no more than that, what is actually admitted by all. 1st. That is, that the White & Tower right was the original one and the original source of title. 2d. That Stafford, the plaintiff herein, succeeded

to it. Appellants, however, sought to show that the plaintiff had disposed of it to defendants' predecessors in interest, and this was the real and only issue in the case at bar. The court would, at the instance of respondent, have instructed the jury that this title of respondent was admitted and that the only question with them was, had he disposed of it, or lost it in any of the modes known to the law. It was found not to be barred by limitation and that
149 he never disposed of it. How, then, could the decree do any injury by going to the jury? It certainly could show no better title than was admitted.

It is admitted by the brief of appellants, and is a fact shown by the pleadings in the case, that the water here in question was not put in issue. Besides, the doctrine that it would be for the court to determine what construction is to be put upon this decree. There was nothing in them that could throw any light upon this decree, even if such pleadings had been permitted to go to the jury, and it was proper for it to draw any conclusion from them that would affect the findings, recitals, or terms of the decree. There was no error, therefore, in withdrawing them from the jury, for the reason that it is clear that the water here in controversy was not embraced in them, but that the decree, which is not disputed, was not based upon any issue raised by them. As a general rule it may be proper in introducing a decree or judgment also to have the pleadings upon which it is based also go with them. But if they are not based on such pleadings, the pleadings in any other case would be equally as applicable or competent.
150 Even when properly admissible, they are not for the jury. The court obviously saw from an inspection of them that they could have no bearing on the issues or decree. That they never put in issue the water in question. That no inference was to be had from them on that account as establishing a trust in respondent or in disparagement of his title, which was tried upon issues framed outside of them, no matter by whom they were verified. The order and specification of the issue as to respondents' title was applicable and competent, if an explanation of the decree was proper or necessary. And if its validity was to be impeached or inquired into, a showing to the court that no such order and specifications were made. The appellants are required to point out the purposes for which these pleadings were offered in evidence, and show their materiality for that very purpose.

See 11 Ohio State, 114–116.
14 Peters, U. S., 448.
36 Cal., 333.
34 Ohio State, 82–86.
3 H. & L. Cas., 1–16.
46 Cal., 234.

If any one was injured by the court on its own motion,
151 withdrawing these pleadings, it was respondents. They show that no allegation was made on account of any diversion of water in the White & Tower ditch. Any claim made against that

right, or any issue made in respect to it, when, if it properly belonged to or had been merged in the Hellgate and Avalanche ditch, or at that time in the Basey ditch, the trespass alleged would necessarily require the assertion of such rights. The deeds show that respondents, since the determination of that suit, purchased the Basey ditch and transferred his interest in the Hellgate and Avalanche ditch, individual rights in each instance being reserved. See record 64 and 66. See also 1st point in brief.

2. We recur now to the other errors assigned in appellant's brief and the record, not referred to in respondents' reply, in view of the oral argument of the case which was then contemplated. The first, (record, page 56,) as to the evidence of Stafford upon the value of the water, we submit the following:

1. The particular grounds of objection are not stated with sufficient certainty. They do not pretend to put their finger upon it.

2. It was competent upon the question of damages.

152 3. It was eminently proper in enabling the court to determine the propriety of granting an injunction as affecting the particular injury to respondent.

4. No injury could have occurred from it, as the damages recovered were only nominal, and such as resulted necessarily from a determination of the other issues in favor of the respondent. As to the refusal of the court to permit Hornbuckle to testify what was said, or that nothing was said, in reference to Stafford's individual rights to water in the creek (see record, p. —), it was utterly incompetent for any purpose.

1. Because all the elements of an estoppel (in fact, none of them) were pleaded as in the case of Ming *et al. vs.* Woolfolk, cited by appellants.

2. The deed speaks for itself, and Stafford expressly reserved such right. (See record, p. —.) His individual claim to water, as contradistinguished from the company property mentioned, being the Hellgate and Avalanche Ditch Company property, if the pleadings were such as to allow it, could neither be varied by his declarations or controlled by his silence. This rule is one of a statutory

153 character and universal in its application. (6 Otto, 547.)

51 New York, 280.

52 New York, 191.

Davy *vs.* Morgan, 56 Barbour.

As to the questions and answers presented to be propounded and given to Rotwitt and others, touching the statements of defendants' predecessors in interest as to respondents' title to this water (see record, pages —), we respectfully submit the following: That the first objection will not be entertained by reason of its generality. It is not sufficiently specific to say generally that such evidence is incompetent. The incompetency must be pointed out that the objection, if tenable, may be removed, if it is susceptible of being done. This leaves us to consider the only objection urged, and the one we suppose really relied upon—*i. e.*, that it was not proper rebuttal. To properly dispose of this question it is necessary to consider the

course the testimony took on the trial. And first of all we might here say that the court, having a discretionary power as to the order of proof, cured every conceivable objection by offering appellants an opportunity to close the evidence upon every fact thereto-
154 fore introduced by respondent in evidence on the trial of the cause. (See record, page —.)

But aside from this, the evidence was eminently proper in rebuttal. Aside from the issue of damages, the pleadings would probably have given defendants the affirmative. This, however, they did not ask, and no objection was urged or exception taken on that ground. But respondent took the usual course; showed by the pleadings and evidence that the title was in him, which, under every presumption, was supposed to remain there until the contrary appeared to repel this presumption. Appellants sought by oral testimony to show an oral sale of this water to the Hellgate and Avalanche Ditch Company, under whom appellants claim that said company never afterwards acknowledged or recognized respondent's rights to it; that they held it adversely during the statute of limitations, and that respondent never after asserted any claim to it, and that the decree was taken in (Stafford's) respondent's name, as trustee for the Hellgate and Avalanche Ditch Company, only an oral sale being relied upon. (See record, pages ——.)

155 To rebut, then, this oral evidence of sale, circumstances before referred to tending to show it, as well as the question as to the adverse character of the use made of the water by the Avalanche Ditch Company when they did so use it, this testimony of Rotwitt, Toombs, and others was eminently proper. It was the only place and time in the trial such evidence could be met. It it was competent at all to prove these facts by oral evidence to affect a sale or exchange of this property, it was equally competent by like testimony to rebut it. (See record, ——.)

Considering, then, the course the evidence took on the trial of the case, it was proper rebutting testimony, and if it was not (which is not conceded) the error was fully cured by the offer made by the court on page 87 of the record.

These, with the 2, 3, 4, & 5th points made by the respondent, cover, we believe, all the errors assigned in this case.

2. As the case was not argued orally, as contemplated, there is, however, one question of importance involved in it, upon which respondents desire to submit a few additional reasons and present the same views fully and systematically. There appears to be about 90, or, according to the
156 evidence, findings, and decree, just 90 inches of water, miner's measurement, that sinks in the bed of the stream between the head of appellant's ditch and the White & Tower ditch of respondent. To get the benefit of this waste water respondent purchases a ditch above the White & Tower ditch, known as the Basey ditch, and when he can make this 35 inches of water more available in the Basey ditch on account of saving this lost water, he was accustomed to do so, or at least, claimed this lost water and thirty-five inches as his property in his complaint, and obtained a decree

accordingly upon such issue tendered and the special and general verdict in the case. We contend first, that the respondent's title to one hundred and twenty-five inches of the waters of the creek and the right to have it flow in and through his Basey ditch, or at his option to have thirty-five inches flow in and through his White & Tower ditch, was directly put in issue, has been found for him by both the court and the jury, and awarded to him by the decree.

157 The court will, in support of this, presume that any evidence necessary to support such findings and decree was properly given on the trial. The only way the sufficiency of this evidence can be inquired into is by properly presenting it on a motion for a new trial. It must be made one of the grounds of the motion for such new trial, and particularly point out wherein it is insufficient. If this is not done, this court has too often decided that it will be disregarded to be any longer an open question. This they have not done. See notice of motion and motion for a new trial.

Second grounds. We say then that they are concluded as to the question of title to this water by the issues, special findings, general verdict, and decree. That it is an adjudication upon a right that cannot be disturbed, on the grounds of the insufficiency of the evidence, except in the mode we have pointed out; and we claim as to every other solitary error assigned they have been fully and fairly met.

While we claim that the foregoing positions, with reference to the title and right of enjoyment of this 125 inches at the head of the Basey ditch is established in respondent, and that it can-

158 not be assailed for want of proof to support it, except as before stated, and that the court will, in the absence of such proper motion and showing, assume even a conveyance from the true owner occupancy for the full period of limitations, or anything else necessary to support such a decree, to have been given in evidence on the trial. We will suppose, for the sake of argument, that the only evidence offered in support of this title was the title by prior appropriation to the 35 inches of water at the head of the White & Tower ditch, and assume that appellants had pointed this out as the only evidence to support that right to 125 inches at the head of the Basey ditch, and in their notice of motion, or motion for a new trial, set it out as they should have done as the grounds wherein the evidence was insufficient, so as that the court would consider it.

We are then met with the following state of facts:

1. That respondent is by priority of right entitled to 35 inches of water at the head of the White & Tower ditch.

2. That it requires 125 inches at the head of his Basey ditch to make that amount at said point.

159 3. That appellants could only appropriate an excess over what would make this 35 inches at the head of the White & Tower ditch; and—

4. That he would be required to let flow unmolested by the head of his ditch a sufficient quantity of water to make 35 inches at the head on said White & Tower ditch.

Can respondent construct (or purchase, as in this case,) a ditch

below appellant's ditch, and get the benefit of this body of water, which sinks and was necessary to support the flow of 35 inches to his White & Tower ditch, and which appellants were required to turn down to him? We say he can: 1st, because by his appropriation he took whatever was necessary to support the flow of 35 inches to the head of his ditch, and thereby acquired an usufructory interest in the body of the water in the stream to that extent; that this usufructory right followed his right to the said thirty-five inches; that he has a right to change the place of diversion so as that it does not injuriously affect others; that this is one of the incidents that attend such prior rights, and that the only limitation upon it
160 is, that the change does not injuriously affect others.

2. That the rights of appellants, or rather their appropriation, did not and could not, from the very nature of things, include this 90 inches of seepage water or water that was sunk and lost between the two ditches, and he consequently acquired no right in it. No one doubts but that respondent could improve the bed of the stream, prevent this water from sinking, and make use of it either by enlarging his White & Tower ditch or constructing another one. Upon the same principle, and for as cogent reasons, he could purchase an old ditch and carry this water through it, and economy and prudence may suggest this course. As against respondent appellants cannot complain, unless by reason of the change they would be required to let more water flow down, which is not the case; but by doing this respondent secures only the water that sunk and was lost. In the case of Davis *against* Gale, 32 Cal., 26 *et seq.*, it is decided that if additional water is turned into a stream the appropriators take it in accordance with *with* the priority of their
161 rights. If water is raised from the bed of the creek and used for a useful purpose, the right to it attaches, and this water, as respects the rights of appellants, occupies precisely the same status. If any one, without the consent of Stafford, should, at an intermediate point between the respective parties, divert this 125 inches of water, or any part of it, so as to deprive respondent of his thirty-five inches, or some portion of it, he alone could maintain an action, because it is his rights which are impaired, and it would be a good defence as against any one else to show that it was the rights only of Stafford he had disturbed. The remedy in such cases follow the right. The true theory upon which this whole matter rests is this: That the rights of respondent to change this place of diversion are not measured by the advantages he may gain in the quantity of water, but upon the basis does the change injuriously affect the respondent.

This question, including the character of rights acquired in the body of the water in the stream above the head of the ditch of the appropriator, and his right to change the nature and place
162 of use of it are fully discussed in Kidd *vs.* Laird, 15 California, from page 161 to 182, inclusive. It is a well considered case, and the court, after discussing all those propositions thoroughly and reviewing former precedents, on page 181, says: "The authorities show conclusively that in all cases the effect of the

change upon the rights of others is the controlling consideration, and that in the absence of injurious consequences to others, any change which the party chooses to make is legal and proper."

Hence, the only question is, does the change injuriously affeet appellants? Is he required to turn more water down than he otherwise would if the change was not made? If not, he is not injured. But suppose we go further, and say that while respondent acquired a right to the use of this 90 inches to support his 35 inches at the head of the White & Tower ditch, appellant likewise, acquired a corresponding right, limiting the respondent to use it at this point. This is inconsistent with the right of respondent to change the place of use in any way that does not injuriously affect the rights
163 of appellants, a principle which seems universally recognized. The appellants, if before this change had been made, might have cut a ditch lower down the creek and acquired more water, or even purchased another if one was to be had, and respondent in such case could not complain so long as he received his quantum. The question is not in what manner or to what extent is respondent benfited by the change, but does the change injuriously affect others. This shows the uniformity of the principles we invoke; its general utility and applicability to all classes of cases, whether the change is sought by a prior or subsequent appropriator, and is in keeping with a good doctrine that a man should never be heard to complain of his neighbor's prosperity so long as the means of its acquisition do not injure him, and no laws, policy or morality are thereby violated.

E. W. & J. K. TOOLE,
Att'ys for Respondent.

And afterwards, on the 14th day of January, A. D. 1880, the appellants herein filed their reply to the foregoing argument and brief of the respondent as follows, to wit:

164 *Reply to Respondent's Argument.*

In the Supreme Court of Montana Territory. January Term, A. D. 1880.

JOSEPH V. STAFFORD, Respondent,
vs.
JAMES HORNBUCKLE *et al.*, Appellant.

The respondent in this action cites no authorities in support of the points made in his brief. He first, in substance if not in form, admits that the decree entered in the case of Gallagher *et al. vs.* Basey was a nullity; that no such decree be entered under the pleadings, but because the defendants in this action did not deny the rendition and entry of such decree, that therefore it could not be objected to, and that it must stand as a muniment of title. Appellants claim that it was absolutely void that the admission or denial that such decree was entered was immaterial, or its introduction in evidence over objection, or without objection, can in no manner affect this case.

165 2. The respondent in his brief claims that the title to the 35 inches of water, and the amount that it would require at some point above the White & Tower ditch to make the said 35 inches, was admitted by the pleadings. We claim that an examination of the pleadings will show that the title to said amount of water, or to any amount whatever, or the right to the use of the same is specifically denied, and was one of the issues to be tried. As to what amount of water that might be required at some point above the head of the White & Tower ditch to make said amount at that point was treated as immaterial matter, and could not be considered as tendering a material issue. A party may change his point of diversion so long as pre-existing rights are not interfered with, but that a sliding scale may be introduced as he goes up the stream, dependent upon evaporation and seepage as he moves, is a fresh innovation upon the decisions of our own courts and those of California before unheard of.

3. The pleadings admitted no case in favor of the plaintiff; the proof introduced by him made no case against the defendants,
166 and if a motion for a new suit had been made, it should have been granted. The defendants, by their evidence, did not certainly make a case for the plaintiff, and therefore the decree herein was erroneous.

4. It is claimed by respondent that the declarations of Warner and others, members of the Avalanche Ditch Company, they being the grantors of the appellants, were admissible upon rebuttal. It will be seen that no foundation for the impeachment of their evidence had been laid, and that such declarations or admissions could be introduced only as proof of respondent's title.

It is claimed that it was only a question of order of proof. Appellants claim that this is not correct. That the rule that the order of proof should be left to the discretion of the court only relates to the evidence while a party is establishing his case or defense. That a plaintiff must make out his case before he rests, and that he cannot, after defendant has rested, then introduce evidence not in rebuttal, not to impeach defendant's witnesses after a proper foundation has been laid, but to strengthen or make out his
167 case in chief—such a rule was never laid down by any court in England or in the United States.

5. Appellants insist that the decree in the case of Gallagher *et al. vs.* Basey *et al.* was a nullity, and respondent in this action could take nothing by virtue of it, the reasons for this being fully set forth in our brief, and fully supported by many authorities. But if this court should be of opinion that such decree had any validity, then an examination of the same will show that only 35 inches of water, miner's measurement, could be claimed under it. It is true that in the recitals or declaratory part of the decree it is set forth that the respondent was entitled to a certain amount of wrter at the head of the White & Tower ditch, or at any point above on the said Avalanche gulch, which would make the amount of 35 inches at the head of the said ditch. Or, in other words, it recites that the evidence discloses this; but when we reach the decretal or

vital part of the decree, we find that the court, by its decree, gave the respondent 35 inches of water at the head of the White &
168 Tower ditch, and nothing more. The subject-matter of this litigation and the questions involved are important, and we respectfully request a careful investigation. The questions raised for an examination were hurriedly passed upon in the court below, mostly without argument, and we sincerely believe that errors were committed.

SHOBER & LOWRY,
CHUMASERO & CHADWICK,
Appellant's Attorneys.

Thereupon this cause was argued by counsel and submitted, and the same taken under advisement by the court until the next or August term, A. D. 1880, of this supreme court.

And afterwards, to wit, on the 13th day of August, A. D. 1880, that being one of the term days of said August term, A. D. 1880, of said supreme court, said cause coming on for the decision and judgment of the court on appeal, the court, on consideration, affirmed the judgment and decree of the court below in said cause, and delivered its opinion in writing, which was duly filed and entered, and is as follows, to wit:

169 In the Supreme Court of Montana Territory. August Term, A. D. 1880.

Appeal from Meagher County, Third Judicial District.

JOSEPH V. STAFFORD, Plaintiff and Respondent,
vs.
JAMES HORNBUCKLE & SAMUEL MARSHALL, Defendants & Appellants.

Opinion of the court by Wade, chief justice:

On the 11th day of July, A. D. 1871, in an action pending in the district court of Meagher county, wherein these defendants and another were plaintiffs, and this plaintiff and others were defendants, the plaintiff herein was adjudged entitled to the use and enjoyment of certain waters of a stream in said county known as Avalanche creek. 1 Montana, 457; Gallagher *et al. vs.* Basey *et al.*, and 20 Wall., 670. And the complaint herein charges a wrongful diversion of such water by the defendants to the injury and damage of the plaintiff, and prays for an injunction and a judgment
170 for the damages so sustained. The defendants in their answer among other things admit the rendition of the decree in the case named, adjudging and decreeing to the plaintiff the aforesaid water, but aver that the same was so rendered in favor of the plaintiff as the trustee of, and for the use of the owners of the Avalanche ditch, and that the defendants are the owners of such ditch.

The sole question tried in the case, as shown by the testimony preserved in the record, and the special issues submitted to the jury, was, whether or not this decree was rendered in favor of Stafford,

as trustee for the ditch owners, or for his own individual use and benefit, and whether Stafford, by his deed of March 30, 1878, conveyed to Hornbuckle and Marshall the water so decreed to him.

1. The rendition of the decree in the case of Gallagher *et al. vs.* Basey *et al.* being admitted in the answer, the introduction of the decree in evidence could not have injured the defendants, for it was but proving what they had already confessed, and as they made no objectien and saved no exception to the introduction of the same, they cannot now predicate error upon its being received in evidence.

171 And for the same reason that the rendition of the decree was admitted in the answer, and its validity unquestioned, the pleadings in the case in which the decree was rendered were properly excluded from the jury. There were no averments in the answer asking to have the decree in that case set aside or declared void. There was no attack made upon the decree, and no allegation that the same was not warranted by the pleadings in the case. The defendants claimed title to the water named in the decree by virtue of the same, and the plaintiff's conveyance to them, upon the ground that the decree was rendered for their benefit, and they were, therefore, in no position to, and they did not, attack the validity of the decree in their answer herein. And hence no question arose in the case calling in question the decree, and for that reason (the rendition of the decree being admitted) the pleadings therein were properly excluded from the evidence. Under the averments of the answer the appellants could not have been prejudiced by the exclusion of such testimony. There were no averments therein that the pleadings in the Gallagher and Basey case would have tended to have proved, and there were no averments in the complaint

172 or replication that such pleadings would have tended to disprove. Even if there was error in rejecting these pleadings, it was an error without prejudice or injury, and a judgment will not be reversed for such an error.

Jackson *vs.* Devlin, 46 Cal., 234.

Moore *vs.* Rollins & Condrey, 36 Cal., 333.

It does not appear for what purpose the pleadings in that case were offered in evidence or how they became material. After the rendition of the decree had been admitted, and its validity confessed by the defendants in their answer, if these pleadings were to go in evidence, their materiality should have been pointed out.

It is claimed in the brief of appellants that as to the water decreed to Stafford, it was outside of any issue tendered in the pleadings in that case, and that a court will not in a decree declare any fact not put in issue by the pleadings. This is undoubtedly true, but the decree is presumed to be supported by everything necessary to its validity until the contrary appears by averment and proof, and if the defendants had wished to attack the decree, they should have made the necessary averments in their answer

173 instead of which they claimed title under the decree, and thereby affirm its validity. They aver in substance in their answer that the water decreed to Stafford belonged to him in his

own right, and that he, for the consideration named in the answer and prior to the rendition of the decree, sold the same to the Avalanche Ditch Company; that the decree though rendered in the name of Stafford, was for the benefit of the company, Stafford being simply a trustee. They therefore affirm the validity of the decree, and take issue only upon the question whether the water so decreed to Stafford belonged to him or to the Avalanche Ditch Company.

2. It appears by the admissions in the pleadings and the proofs that it requires 125 inches of water at the head of defendants Avalanche ditch to make 35 inches at the head of plaintiff's White & Tower ditch, and it is necessary to determine whether, under the decree aforesaid, the plaintiff is entitled to the use and enjoyment of all the water that must pass the head of defendants' ditch to make the required amount at the head of plaintiffs' ditch. The decree provides: "And it appearing from
174 the premises to the satisfaction of the court that, as against the plaintiffs (these defendants and another) in this action, the right of the defendant (this plaintiff) J. V. Stafford to the use and enjoyment of such an amount of the waters of Avalanche creek, mentioned in plaintiff's complaint, to be taken from said creek at the head of defendants' ditch (the Avalanche ditch) as would amount to 35 inches at the head of the plaintiffs' (White & Tower) ditch, is clearly and fully established; and that, as against the defendants in this action showing the above amount of the waters of said gulch, the plaintiffs in this action are clearly entitled to the free use, occupation, and enjoyment of 215 inches, miner's measure, of the waters of said Avalanche creek, to be taken therefrom at the point where their said ditch taps said Avalanche creek, and described in said complaint, and that the said plaintiffs have an indisputable right, as against the defendants, to have said amount of the waters of said gulch at all times to flow down said creek to the head of their said ditch." The defendants are thereupon perpetually enjoined from interfering with the flow of the waters
175 of Avalanche creek to the amount of 215 inches thereof down the natural channel of the gulch to the head of the plaintiffs' ditch. This is subject, however, to the right of Stafford, at all times, to take of the waters of said creek 35 inches at the point thereon where the plaintiffs' ditch taps the same, or at any point on said creek above where plaintiffs' ditch taps the same.

Under this decree the Avalanche Ditch Company (now these appellants) were required to let flow past the head of their ditch sufficient of the waters of such creek as would make 35 inches at the head of the White & Tower, the respondents' ditch. The decree declares that Stafford's right to take such an amount of the waters of said stream at the head of the company's ditch as would make 35 inches at the head of his ditch is clearly established, and in consequence of this right of Stafford, it is adjudged that he may at all times and at any place on said Stream above his ditch take 35 inches of the waters of the stream, which 35 inches, considering the right found to exist in the respondent to take sufficient of said waters at the head of appellants' ditch as would make 35 inches at the head

of respondents' ditch, and considering the decree as a whole,
176 must be construed to mean such an amount of said waters as would make 35 inches at the head of respondents' ditch. That is the point designated in the decree for the measurement of the water, and the respondent is the owner, not only of the inches at the head of his ditch, but of sufficient of the waters of the stream at the head of appellants' ditch, or at any point above his ditch as would make the required amount at the point of measurement. That is to say, if it requires 125 inches of water at the head of appellants' ditch to make 35 inches at the head of respondent's ditch, then under this decree the respondent is entitled to the 125 inches at the head of appellants' ditch, and is entitled to take such amount of said waters at that point. The intention of the decree, as shown by the language thereof, was and is to give to Stafford at the head of appellants' ditch, accompanied with the right to take the same at that point, or at any point below, sufficient of the waters of the stream to make 35 inches at the head of respondent's ditch. The designation of 35 inches at that point was only a means of measuring the amount that Stafford became entitled to at the head
177 of appellants' ditch, and the amount they were required to let flow past their ditch for the use and benefit of Stafford. The amount of water which they were thus required to let flow past the head of their ditch is found to be 125 inches, and that amount of the waters of the stream under the decree, the respondent became entitled to at any point betweet the head of appellants' ditch and the ditch of the respondent.

What Stafford may have done to improve the stream and to prevent the loss of water between his ditch and that of appellants, or what other waters he may have turned into the stream, since the rendition of the decree, between these two points, does not affect the question. His rights must be determined by the decree, and its application to the surrounding conditions at the date thereof.

3. It was sought by the appellants to show that the 35 inches of water so decreed to Stafford were by him conveyed to them by the deed of March 30, 1878, and for this purpose asked Hornbuckle, one of the appellants, the following question:

178 "What, if anything, was said at the time (that is, at the time of making the deed) by Stafford as to any individual claim by Stafford to rights in the Avalanche gulch?"

The deed in plain, unambiguous terms purports to quit claim to Hornbuckle and Marshall, the interest of Stafford in the property of the Avalanche Ditch Company, expressly reserving from such conveyance the individual rights of Stafford. His individual right to the waters of Avalanche creek was, therefore, not affected by this quit claim of his interest in the company's property. Where there is no estoppel pleaded, and no fraud alleged, the deed must speak for itself. Evidently the purpose of this enquiry was to show that the title to the White & Tower ditch passed to the appellants by the conveyance, for the reason that the respondent failed to declare his title thereto. In other words, that he is estopped by his silence. In the absence of fraud, silence does not work an estoppel.

Fraud must be pleaded before it can be proved. An estoppel *in pais* cannot be established in the proof without being alleged in the pleadings. But the respondent was not silent. The deed
179 carefully excludes from the property conveyed all such as the respondent owned in his individual right, and whether he thus owned this 35 inches of water, was the sole question triéd in the case. In the absence of any fraudulent concealment, the respondent could well stand upon the plain, unambiguous language of his deed as excluding from the conveyance his individual property. Fraudulent concealment, like any other fraud, should have been pleaded, and the proof of mere silence, in the absence of an allegation of fraud, does not establish or tend to establish an estoppel.

Griswold *vs.* Boley, 1 Montana, 560.

The case does not come within that of Kinna *vs.* Woolfbolk, 3 Montana, page ——, and the question asked the witness was properly excluded.

4. The original members of the Avalanche Ditch Company, grantors of the appellants, had given testimony tending to show that by virtue of an oral agreement with such grantors the respondent had divested himself of his title to the water in question. As affecting their credibility and the weight to be given to their
180 testimony, it was competent for the respondent to show in rebuttal that such grantors had made different and contradictory statements to that testified to by them. And this is not in conflict with the rule that the declarations of a grantor in disparagement of his title are inadmissible. The appellants attempted to show that the respondent had parted with his title to this water by the oral declarations of their predecessors in interest, and as discrediting their evidence it was competent, as in any other case, to show that they had made contradictory statements, and that ever since the deed aforesaid, and prior thereto, they had always recognized and acknowledged the respondent's individual right to the water in question. At the close of this rebutting testimony by the respondent the record shows that the court announced to the attorneys of the appellants that they were at liberty to introduce any evidence to contradict or invalidate any evidence theretofore produced by the respondent, as if such evidence had been given and introduced by him in chief in making his case in the first instance.

This opportunity given appellants put the matter entirely
181 at rest, and placed them in the same position as to the production of evidence as if this testimony of respondent had been given when he opened his case, and no possible injury could have resulted to them by the court so directing the order of proof, as it had the right to do. And whether this evidence was properly rebutting testimony or not is wholly immaterial, so long as the appellants were given an opportunity to contradict or disprove it.

5. Upon the general assignment of error, that the evidence does not support the verdict or special issues found by the jury, we cannot inquire to ascertain the fact or examine the question. The

assignment of error should specify particularly and clearly in what respect the evidence fails to support the verdict, or it will be disregarded. This has been too often decided to need repeating here.

6. It is contended that the second instruction given to the jury made it incumbent upon the appellants to show that respondent had parted with the 35 inches of water. The effect of the in-
182 struction was, that if the respondent had shown that he was the owner of and entitled to the possession of this water for irrigating purposes, the law would presume that such right continued until it was shown that he had parted with the same. The instruction is correct. If the respondent by his proof established title in himself, it was then incumbent upon the appellants either to disprove the title of respondent, or to show that he had parted with the same. It is also claimed that the court, in the instruction number five, left it to the jury to say what was admitted in the pleadings. This is not a correct interpretation of the instruction. The instruction charges the jury, that as to the ownership of the 35 inches of water, the appellants admit the legal title to the same to be in the respondent, and assert that they are the equitable owners by reason of a transfer of the same to the Avalanche Ditch Company, and, therefore, that the burden of establishing such transfer by a preponderance of evidence is upon them. The instruction places the same burden upon them in case the respondent did not rely upon the admission in the pleadings, and should, by the evidence, show
183 the title in himself. That is to say, this title being undisputed or conclusively established, the burden would then be upon the appellants to show such a transfer. After declaring that the legal title of the respondent is admitted in the pleading, and, therefore, that the burden of establishing their equitable title is upon the appellants, the instruction further declares that "if it is admitted in the pleadings or proved to your satisfaction that the legal title to this water is in the plaintiff, then the defendants, in order to maintain their defense, must show their equitable title, and that the plaintiff is trustee for them, by a proponderance of evidence. The purpose of this part of the instruction was to inform the jury that the same quality of proof would be required to establish the equitable title of appellants, either if the legal title of respondent was admitted in the pleadings or established by the proof. We see no error in the record, and the judgment is affirmed, with costs.

DECIUS S. WADE,
Chief Justice.
WM. J. GALBRAITH,
Asso. Justice.

184 And on the same day, to w t, the 13th day of August, A. D. 1880, the said appellants filed their bill of exceptions to the decision of this supreme court in said cause, in words and figures following, to wit:

Bill of Exceptions.

In the Supreme Court of Montana Territory. August Term, A. D. 1881.

JOSEPH V. STAFFORD, Respondent,
vs.
JAMES HORNBUCKLE and SAMUEL MARSHALL, Appellants.

This cause came on for decision before said court this 13th day of August, A. D. 1880, and the decision of said court rendered affirming the judgment and decree appealed from.

The court makes the following special findings, to wit:

1. The court finds that by virtue of the decree and judgment in the case of Gallagher *et al. vs.* Basey *et al.*, introduced in evidence in this cause, awarding to the respondent, Joseph V. Stafford,
185 35 inches of the waters of Avalanche gulch, entitled the respondent to the 125 inches of the waters of said Avalanche gulch at the point designated in the decree in this case; and also finds that respondent is entitled to 125 inches of water at the head of appellants' ditch, by virtue of said decree.

2. The court further finds that there is no error appearing in the record on appeal in this cause affecting the substantial rights of the appellants, and the judgment and decree of the court below is affirmed.

To which findings and decision of said court, appellants by their counsel then and there duly excepted and prays the court to sign and seal this their bill of exceptions and make the same a part of the record in said cause, which is accordingly done in open court this 13th day of August, A. D. 1880.

DECIUS S. WADE,
Chief Justice.
WM. J. GALBRAITH,
Asso. Justice.

Thereupon judgment on appeal was entered in words and figures following, to wit:

186 *Judyment on Appeal.*

In Supreme Court of Montana Territory. August Term, A. D. 1880.

JOSEPH V. STAFFORD, Plaintiff and Respondent,
vs.
JAMES HORNBUCKLE and SAMUEL MARSHALL, Def'ts and Appellants.

Be it remembered, that in the present term of August, A. D. 1880, this cause came on regularly for decision and judgment on appeal, the same having been argued and submitted at the January term, A. D. 1880, of this supreme court, and taken under advisement by the court. Whereupon, on consideration, it is now here ordered and adjudged by this court that the judgment and decree entered in said cause by the court below on the 26th day of April,

A. D. 1878, be, and the same is hereby, affirmed with costs. And it is further ordered and adjudged by this court that the said plaintiff and respondent, Joseph V. Stafford, recover against the said defendants and appellants, James Hornbuckle and Samuel
187 Marshall, —— dollars, for his costs and disbursements herein expended and have execution therefor.

13th August, A. D. 1880.

And afterwards, to wit, on the 30th day of July, A. D. 1881, the said appellants filed herein their undertaking on appeal to remove said cause to the Supreme Court of the United States, which said undertaking is in the words and figures following, viz:

In the Supreme Court of the United States.

JAMES HORNBUCKLE and SAMUEL MARSHALL, Plaintiffs in Error,
vs.
JOSEPH V. STAFFORD, Defendant in Error.

Know all men by these presents, that we, John Horsky and John Stewart, of Helena, Lewis & Clarke county, Montana Territory, are held and firmly bound unto Joseph V. Stafford, defendant in error, in the sum of five hundred dollars, lawful money of the United States, for the payment of which, well and truly to be made, we do firmly by these presents bind ourselves, our heirs, executors,
188 and administrators. Sealed with our seals, and dated this 24th day of July, A. D. 1881.

The condition of the above obligation is such, that whereas the above-named James Hornbuckle and Samuel Marshall, plaintiffs, have taken an appeal to the Supreme Court of the United States, to reverse the judgment rendered in the above entitled cause by the supreme court of Montana Territory, on the 13th day of August, A. D. 1880, in favor of said defendant, and against said plaintiffs in error.

Now, therefore, the condition of the above obligation is such, that if the said James Hornbuckle and Samuel Marshall shall prosecute their said appeal, and answer all damages and costs which may be awarded against them on such appeal, not exceeding the said sum of five hundred dollars, then this obligation shall be void, otherwise to be and remain in full force and effect.

Given under our hands and seals, this 24th day of July, A. D. 1881.

JOHN HORSKY. [SEAL.]
JOHN STEWART. [SEAL.]

In presence of—
J. H. SHOBER.

189 The above bond and the sufficiency of the sureties thereto approved by me, this 26th day of July, A. D. 1881.

WM. J. GALBRAITH,
Associate Justice of the Supreme Court of the Territorry of Montana.

And on the same day, to wit, on the 30th day of July, A. D. 1881, the said appellants filed herein their notice of appeal of which, in words and figures, the following is a copy, to wit:

In the Supreme Court of Montana Territory.

JOSEPH V. STAFFORD, Plaintiff and Respondent,
vs.
JAMES HORNBUCKLE and SAMUEL MARSHALL, Defendants and Appellants.

The President of the United States to the Honorable the Judges of the Supreme Court of the United States:

The appeal of James Hornbuckle and Samuel Marshall, the above-named defendants and appellants, respectfully showeth:

That on the 13 day of August, A. D. 1880, a final decree and
190 judgment was made and pronounced in this cause by the Supreme Court of the Territory of Montana wherein it was in substance adjudged and decreed that the said appellee was entitled to one hundred and twenty-five inches of the waters of Avalanche creek, when the decree under which said appellee claims title only gives him the right to thirty-five inches of the waters of said Avalanche creek at the point of the original diversion, and by the judgment and decree of said supreme court said appellee is permitted to change his diversion to a point higher up on said gulch and take out of the waters of said stream ninety inches more water than his original appropriation called for. Wherefore these appellants appeal from the whole of said decree of said supreme court of Montana Territory and respectfully pray that the decree of said circuit court, and the bill, answer, pleadings, depositions, evidence and proceedings in the said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that

the said decree of the supreme court of the Territory of
191 Montana, and every part thereof, may be reversed, and a decree made dismissing said petition of appellee with costs, or such other *other* decree as to the said Supreme Court shall seem just.

Dated this 30th day of July, A. D. 1881.

J. H. SHOBER AND
CHUMASERO & CHADWICK,
Att'ys for Appellants.

And on the same day, to wit, on the 30th day of July, A. D. 1881, the said appellants, James Hornbuckle and Samuel Marshall, filed herein their writ of error to the supreme court of the Territory of Montana, directing the said supreme court to transmit to the Supreme Court of the United States the record and proceedings in said cause, with all things concerning the same, and have the same in said Supreme Court of the United States on the second Monday of October next, of which writ of error, in words and figures, the following is a copy, to wit:

192 *Writ of Error.*

UNITED STATES OF AMERICA, *ss.*

The President of the United States, to the honorable judges of the supreme court of the Territory of Montana, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said supreme court of Montana Territory, before you or some of you, in a cause between Joseph V. Stafford, plaintiff and respondent, and James Hornbuckle and Samuel Marshall, defendants and appellants, a manifest error hath happened, to the great damage of the said James Hornbuckle and Samuel Marshall, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in that behalf, do command you that if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, together with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the
193 second Monday of October next, in the said Supreme Court to be then and there held, that the said record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness Honorable Morrison R. Waite, Chief Justice of said Supreme Court, this 30th day of July, A. D. 1881.

[SEAL.] I. R. ALDEN,
Clerk of the Supreme Court of Montana Territory.

Allowed in open court August 13, A. D. 1880.

And on the same day, to wit, the 30th day of July, A. D. 1881, said appellants filed herein their notice of appeal, of which said notice of appeal and the affidavit of service endorsed thereon, in words and figures, the following is a copy, to wit:

194 *Notice of Appeal.*

The Honorable Wm. J. Galbraith, associate justice of the supreme court of Montana Territory:

To Joseph V. Stafford, appellee: Whereas James Hornbuckle and Samuel Marshall have lately appealed to the Supreme Court of the United States from a decree lately rendered in the supreme court of Montana Territory made in favor of you, the said Joseph V. Stafford, and his filed the security required by law, you are therefore hereby cited to appear before the said Supreme Court at the city of Washington on the second Monday of October, A. D. 1881, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at Deer Lodge City, in the Territory of Montana, this 26th day of July, A. D. 1881.

WM. J. GALBRAITH,
Associate Justice Supreme Court of Montana Territory.

Affidavit of Service.

195 TERRITORY OF MONTANA, } ss:
County of Lewis & Clarke, }

JAMES HORNBUCKLE and SAMUEL MARSHALL, Appellants,
vs.
JOSEPH V. STAFFORD, Appellee.

JOHN H. SHOBER, being duly sworn, saith: That on the 30th day of July, A. D. 1881, he served on the above-named appellee, Joseph V. Stafford, and his attorney, E. W. Toole, Esq., a copy of the appeal, and a copy of the citation filed in this cause, with the clerk of the supreme court of Montana Territory, by delivering said copy of the citation to the said appellee and his said attorney, E. W. Toole, Esq., personally, and by leaving said copy of appeal in the clerk's office of the supreme court of the Territory of Montana.

JOHN H. SHOBER.

Subscribed and sworn to before me, this 30th day of July, A. D. 1881.

I. R. ALDEN,
Clerk Sup. Court, M. T.

And on the same day the appellants filed herein their citation, in words and figures following, to wit:

196 *Citation.*

UNITED STATES OF AMERICA:

In Supreme Court.

JAMES HORNBUCKLE and SAMUEL MARSHALL, Plaintiffs in Error,
vs.
JOSEPH V. STAFFORD, Defendants in Error.

To JOSEPH V. STAFFORD, *Defendant in Error:*

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to an appeal filed in the clerk's office of the supreme court of the Territory of Montana, wherein James Hornbuckle and Samuel Marshall are plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable Wm. J. Galbraith, associate justice of the supreme court of Montana Territory, this 26th day of July, A. D. 1881.

197 WM. J. GALBRAITH,
Associate Justice Supreme Court of Montana Territory.

Affidavit of Service.

TERRITORY OF MONTANA, *ss:*

JAMES HORNBUCKLE and SAMUEL MARSHALL, Appellants in Error,
vs.
JOSEPH V. STAFFORD, Appellee in error.

John H. Shober, being duly sworn, saith: That on the 30th day of July, A. D. 1881, he served on the above-named appellee, Joseph V. Stafford, and his attorney, E. W. Toole, esq., a copy of the appeal and a copy of the citation filed in this cause with the clerk of the supreme court of Montana Territory, by delivering said copy of the citation to the said appellee and his said attorney personally, and by leaving said copy of the appeal for said appellee in the clerk's office of the supreme court of Montana Territory.

JOHN H. SHOBER,
Att'y for Appellants.

Subscribed & sworn to before me, this 30th day of July, A. D. 1881.

I. R. ALDEN,
Clerk Sup. Court, M. T.

The appellants then filed their affidavit of value as follows, to wit:

198 *Affidavit of Value.*

In the Supreme Court of Montana Territory.

JOSEPH V. STAFFORD, Respondent,
vs.
JAMES HORNBUCKLE and SAMUEL MARSHALL, Appellants.

Samuel Marshall, being duly sworn, makes oath and says he is one of the appellants in the above-entitled cause; that he is desirous of prosecuting a writ of error from the decision of the supreme court of Montana Territory to the Supreme Court of the United States; that he is well acquainted with the property involved in the issues in said cause and in controversy therein, and the value thereof; that the said property, the right to which is involved in the issues in this cause and adjudicated by the judgment therein, is of the value of two thousand dollars; and further affiant saith not.

SAMUEL MARSHALL.

Subscribed & sworn to before me, this 30 day of July, A. D. 1881.
[SEAL.] J. H. SHOBER,
Notary Public, M. T.

199 In the Supreme Court of Montana Territory.

JAMES HORNBUCKLE and SAMUEL MARSHALL, Plaintiffs in Error,
vs.
JOSEPH V. STAFFORD, Defendant in Error.

I, Isaac R. Alden, clerk of the supreme court of Montana Terri-

tory, do hereby certify that the foregoing one hundred and ninety-eight pages, numbered from 1 to 198, inclusive, contain a full, true, and correct transcript of certain pleadings, records, and proceedings filed, made, and had in the above-entitled cause in said court as the same remain on file and of record in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said supreme court at Helena, in said Territory, this 1st day of September, A. D. 1881.

[SEAL.] ISAAC R. ALDEN, *Clerk.*

Endorsed on cover: Montana Ter'ty supreme court. No. 315. James Hornbuckle and Samuel Marshall, plaintiffs in error, *vs.* Joseph V. Stafford. Filed 27th September, 1881.

111-389

Office Supreme Court U. S.
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JAMES. H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1883.

No. 315.

JAMES HORNBUCKLE AND SAMUEL MARSHALL,
PLAINTIFFS IN ERROR,

vs.

JOSEPH V. STAFFORD, DEFENDANT IN ERROR.

Error to Supreme Court of Montana.

BRIEF FOR PLAINTIFF IN ERROR.

LUTHER H. PIKE,
For Plaintiff in Error.

JUDD & DETWEILER, Printers.

Supreme Court of the United States.

OCTOBER TERM, 1883.

No. 315.

JAMES HORNBUCKLE AND SAMUEL MARSHALL,
PLAINTIFFS IN ERROR,

vs.

JOSEPH V. STAFFORD, DEFENDANT IN ERROR.

Error to Supreme Court of Montana.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This case in one of its phases has been before this court before.

Basey *vs.* Gallagher, 20 Wall.

In the spring of 1871, John Gallagher, James Hornbuckle, Samuel Marshall, members of the company, instituted suit against W. Basey, James McCabe, Joseph V. Stafford, members of the Avalanche Ditch Company, in one of the district courts of Montana Territory. They prayed for an injunction to restrain the defendant company from diverting the water of a stream known as Avalanche creek, to

which they asserted a right by appropriation for the purpose of irrigation.

Stafford had become a member of the Avalanche Ditch Company by contribution of his water right in Avalanche creek, and he was sued by Gallagher *et al., not in his individual right and capacity, but only as a member of the Avalanche Ditch Company.*

He made no individual separate defence. He only verified the answer filed on behalf of the members of the company—qua company.

The decree was in favor of the plaintiffs, except as to thirty-five inches of water to Stafford, on White Tower ditch, the lowest of three ditches on Avalanche creek.

This decree was made July 11, 1871, and was affirmed by the supreme court of the Territory and by this Court.

Afterwards, March 30, 1878, Stafford quit-claimed to Hornbuckle and Marshall his interest in the property of the Avalanche Ditch Company, with reservation of his individual rights, *not specified.*

Then in April, 1878, Stafford instituted the present suit against Hornbuckle and Marshall. He, claiming that he had an individual right to have thirty-five inches of water at White Tower ditch, under the decree in Basey *vs.* Gallagher, asked for injunction and damages.

The defence of Hornbuckle and Marshall was that, under the issues joined in Basey *vs.* Gallagher, the court could not, and so did not, render a decree in favor of Stafford individually; that the true intent and scope of the decree in that case in, what was apparently in favor of Stafford individually, was in his favor as trustee for the Avalanche Ditch Company.

That by their purchase of Stafford's interest in the property of the Avalanche Ditch Company of March 30, 1878, they acquired all the interest or right of water Stafford had.

Stafford and Hornbuckle and Marshall having been contending parties to the first suit, and Stafford predicating his right of action in this last suit upon the decree in the first, it is quite certain *this last suit was to have determined the intent and scope—the meaning of the decree in the first suit.*

The vital question in the case was whether or not so much of the decree rendered in the first suit as was apparently in favor of Stafford, in his individual right, was so intended, or was in his favor as trustee of the defending company, of which he was a member, he being sued only as a member of that company.

On the trial plaintiff, Stafford, introduced in evidence the decree passed in the first case; then defendants Hornbuckle and Marshall offered to introduce in evidence in their behalf the complaint and answer filed in that case.

The court excluded the complaint and answer. It erred in doing so.

It being established ground that Stafford was a member of the Avalanche Ditch Company, the defendants, Hornbuckle and Marshall, offered to introduce evidence tending to show how and upon what consideration Stafford became a member of that company; that the contribution of his water right in Avalanche creek was the consideration.

The court excluded this testimony. It erred in doing so.

The defendants, Hornbuckle and Marshall, offered to introduce testimony of Hornbuckle as to declarations made by Stafford in respect to his right to water at the time he made his quit-claim deed to Hornbuckle and Marshall.

The court excluded this testimony. It erred in doing so.

The court permitted plaintiff Stafford to introduce in evidence the pleadings in the first suit, and then, of its own motion, struck them out. It erred in doing this.

The court erred in rendering judgment in favor of plaintiff and against defendants.

The decisions of this court in—

Campbell *vs.* Rankin, 99 U. S.;
Cromwell *vs.* County, etc., 94 U. S., 351;
Davis *vs.* Brown, *Ib.*, 423;
Russell *vs.* Place, *Ib.*, 606;

are of controlling force as to the first error assigned, viz., the exclusion of the pleadings of the first suit.

The institution of the last suit immediately upon the heels of the quit-claim deed of March, 1878, an unfavorable circumstance to the plaintiff, clearly showed that the parties plaintiff and defendant to it construed differently the decree in the first.

The plaintiff pleaded that decree in his favor. He could not do this without involving a consideration of the record of which it was but a part.

"To render the judgment conclusive, it must appear *by the record* of the prior suit that the particular matter sought to be concluded was necessarily tried or determined.

"If there be any uncertainty on this head in the record, as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was

rendered, the whole subject-matter of the action will be a large and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise points involved are determined."

Russell *vs.* Place, 94 U. S., 608.

The precise point involved in the last suit was whether, in the first, Stafford was a defendant in his individual right, and whether the issues tried involved a determination of his individual rights.

The pleadings were most material evidence on this point. Their exclusion, when offered, was clearly erroneous.

And when the court permitted the plaintiff Stafford to introduce them in evidence and then struck them out upon its own motion, it substantially decided and informed the jury that upon its inspection of the pleadings it found they showed that Stafford's individual rights were in issue in the first suit. This without permitting the record to go before the jury, and this court, the one of last resort, for it to determine whether or not the record sustained the court.

This, and the refusal to permit the defendants to put the record in evidence, were well calculated to mislead the jury and prejudice the defendant's case.

The court, taking the decree in the first suit as absolute, and permitting the plaintiff Stafford to introduce extrinsic evidence as to the quantity of water he was entitled to take at the Basey ditch, whilst refusing to permit the defendants, Hornbuckle and Marshall, to introduce the record to explain that decree, certainly made the trial a most one-sided affair against the defendants.

Testimony conducing to show that the consideration

Stafford paid for his membership in the Avalance Ditch Company was the contribution of his water right in Avalanche creek, and his declarations as to his water rights at the time he made his quit-claim deed to defendants, Hornbuckle and Marshall, were material to defendants' case, and the court should have permitted its introduction.

But I will not amplify as to this, as the court will have the benefit of the elaborate briefs submitted to the court below by the attorneys who contended there.

These briefs are printed with the record, having been sent up as part of it, a practice not to be commended, as, under the court's new rule, it enforces the plaintiff in error to pay in the first instance for printing a brief for defendants' in error attorneys. They might as well be required to pay the fee of the attorneys in the first instance.

Respectfully submitted.

LUTHER H. PIKE,
For Plaintiff in Error.